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PUBLIC LAW

Spring, 1959

COMMENT

ONE of the advantages of the House of Lords is its freedom of debate, its lack of procedural and other restrictions. Last year, in the Autumn issue of this quarterly, we referred to the difficulties experienced by a Member of the Commons who wished to discuss chief constables, and how he was ruled out of order. On December 8, 1958, Earl Winterton, in the House of Lords, called attention to the need for the appointment of a Committee to inquire whether the statutory control of certain local authorities over provincial police forces was being properly exercised, whether the powers of the Home Office Inspector of Constabulary needed to be strengthened and whether, in the interests of efficiency, it was desirable to amalgamate some of the smaller police forces with other larger forces; and he moved for Papers. A debate of nearly three hours followed. Earl Winterton said that he thought it was advisable and reasonable that the House should discuss the matter because it was "almost impossible under the rules of another place to have a discussion of the character for which this Motion provides." The mover referred to the wide variation between the efficiency of the various police forces; to the lack of proper liaison between forces; to the attitude of chief constables who had been officers in the Army and Navy to those chief constables who had risen from the ranks; to the inadequacies in equipment of some of the smaller forces; to the multiplicity of police authorities; to the allegations on the one side that the chief constable had too much power over the local police authority and on the other that political patronage crept into decisions on promotions and that an authority might make difficulties for a chief constable who did not work with them; that strike-breakers were not always properly controlled in the provinces. Earl Winterton went on to refer to police action (or lack of it) in the racial trouble at Nottingham; to an incident at Woking where soldiers held up a train; to the Brighton case; to the case of the former chief constable of Worcestershire who "is now in prison for having stolen

money from a police fund"; to the numerical weakness of the constabulary inspectorate system; and to the difficulties of a person in the provinces, in contrast with a person in the metropolis, who feels aggrieved by police actions; and he suggested that there might be a Police Authority Council to consider complaints. Four other peers spoke in the debate in addition to Lord Chesham who replied for the Government. When Earl Winterton replied, he said that Lord Chesham had satisfied him on the question of the large number of police authorities and that their mobility matched that of the criminal. Otherwise he was clearly not satisfied, specifically on the inspectorate ("I am in complete doubt about what the inspectors are for"), on the "complete difference of functions between the standing joint committees and the watch committees," on the position of chief constables and the difficulty of challenging their actions. With reluctance, because of a previous undertaking he had made not to press the matter to a Division, Earl Winterton asked leave to withdraw his motion.

The considerable dissatisfaction obviously felt by most of their Lordships who spoke in this debate was no doubt partly caused by the remarkably inept performance of Lord Chesham. His case was weak if he was to argue that the circumstances did not justify an inquiry; and he managed to make the worst of it. Earl Winterton had suggested that the Brighton affair indicated that the inspectorate should be strengthened; Viscount Alexander of Hillsborough spoke of the inspection as "cursory" and "having little to do with a check on the system of administration that is operating"; Lord Milner of Leeds spoke of the annual visit of inspectors "at a pre-indicated time and date of which ample notice is given" which he thought "quite wrong and quite inadequate"; Lord Pakenham concluded that the task of the inspectors—of whom there are five for the whole of England and Wales—was "fantastic" since it was their duty to report to the Home Secretary on the efficiency of all the police forces, except that of the metropolis. Lord Chesham replied that the inspections were "searching," that the reports were detailed, that it was unlikely that deficiencies in a police force would escape the vigilance of the inspectors—and that he did not know whether Lord Pakenham was now more satisfied or not. The following exchange is then recorded. *Lord Pakenham*: "My Lords . . . my answer is, No; I am not in any way more satisfied." *Lord Milner*: "Neither am I." *Lord Chesham*: "We shall remain at variance on this matter, and I do not see that there is much more that I can do about it." *Viscount Alexander*: "Come! Be persuaded." *Lord Chesham*: "Frankly, no." Earl Winterton asked whether it was the function of the inspectors to have discovered (which they did not) that for

several years gross corruption had been going on in the Brighton police force. Lord Chesham replied that it was not; their function was to see whether the force was efficient (*Earl Winterton*: "It could not be efficient if it was corrupt") and that it was unreasonable to suggest that Her Majesty's inspector should have unearthed the particular corruption that was going on in Brighton because it was not one of his responsibilities to do so. Lord Chesham said that a private citizen could complain to the chief constable or to the watch committee and the watch committee if "really convinced that something is going wrong in a sphere over which they have no control—that is, enforcement of the law— . . . can always call the attention of Her Majesty's inspector to it."

Once again, theoretical possibility is made an excuse for a practical breakdown. It is, apparently, not the duty of the inspectorate to conduct its operations so as to detect corruption; and clearly its present strength and methods make such detection virtually impossible. Also, it is not the duty of the watch or standing joint committees to detect corruption which arises in the course of the enforcement of the law by the police. So the only answer can be that if someone comes across something that looks like corruption, he can draw the attention of the authorities to it. But how lame is this answer. *Earl Winterton* said that the corruption in Brighton came to light only because members of the Criminal Investigation Department found certain facts when they were inquiring into the case of Dr. Adams. However, again as *Earl Winterton* pointed out, there were certain outward manifestations not of the corruption itself but of happenings associated with it, such as those at "the disreputable night club" where "there were nightly scenes of a most disgusting character. . . . There must have been dozens of people passing who heard what was going on. The police on patrol duty must have known, and yet apparently not a word of it reached the Watch Committee." If in such a case nothing was officially done until the C.I.D., investigating a murder charge, made some reports, is it likely that the theory of the "private citizen" has much practical application?

The police are, of course, in a position of peculiar independence, especially, as already mentioned, where the matter is one of law enforcement. *Earl Winterton* and those who supported him repeatedly stressed that they were not seeking to place provincial forces in the same position as the Metropolitan Police with a Minister having direct responsibility. They were asking that the control should be made more efficient and more democratic. The proposal that a special area council should be set up, composed of local authority representatives and independent members (who might be Queen's Counsel), who would be able to hear complaints, is part of a larger

demand. It is becoming increasingly apparent that the House of Commons and local councils are not properly equipped and composed to deal with ordinary complaints. We need a number of area bodies, having no executive responsibility and being independent of executive action, to receive complaints and to investigate. Again we return to the kind of institution described by the Danish Parliamentary Commissioner in an earlier issue. We need a forum for grievances but a forum with proper investigating powers. It must be a forum having none of the crippling weaknesses of the consultative or consumer councils for nationalised industries. It must be given high status. We hope to publish later this year an article which will examine in some detail the practical working of the Danish experiment. Thereafter perhaps definite proposals can be put forward. But all this will be low hurdling compared with the surmounting of the high obstacle of persuading politicians and civil servants that the idea has merits.

The new Town and Country Planning Bill is passing fairly rapidly through the Houses of Parliament and seems likely to emerge with relatively few amendments. More than a short note is needed to consider its provisions but its radical character should be emphasised. Far more than other amending legislation does this Act cut at the roots of the Act of 1947. It is true that the original provisions concerning planning permission are left untouched in their essentials but the financial clauses in the new Bill will put a great strain on the long-term projects of local planning authorities. In 1957-58 these authorities spent some £33 million on buying land. It is estimated that the Bill would increase this figure by about 25 per cent. Further, where such land purchases are grant-aided, the Local Government Act, 1958, will operate and the grants will no longer be specifically claimable. Instead they will be absorbed into the general grant. The fortunes of planners fluctuate and the period between 1947 and 1951 is beginning to acquire the aura and the proverbial consequences of a bright sky at morning. Perhaps the metaphor, however, will not hold; for farmers, if not shepherds, will rejoice and be enriched by today's afternoon which looks so threatening to planners. The owners of land on the fringe of towns, in particular, will again be able to demand prices far beyond the existing use value, while local education and housing authorities will find their costs so greatly increased that some, at least, may hesitate to buy unless their need is overwhelming. To the layman, the actions of politicians are sometimes inexplicable. And the decision of the proud fathers of the Act of 1947 not to oppose in principle the massacre of their eleven-year-old is bewildering to simple minds. Perhaps the Labour Party no longer

believes in planning. Perhaps the imminence of a General Election has proved decisive.

Part III of the Bill is consequential on the Franks Report. Clause 24 enables the validity of certain orders to be challenged in the High Court. Clause 25 applies section 9 (1) of the Tribunals and Inquiries Act, 1958, to certain ministerial decisions from which appeals will now lie on questions of law to the High Court. Clause 26 inserts a new section into that Act of 1958 under which the Lord Chancellor may make rules for regulating the procedure to be followed in connection with statutory inquiries. And there are other provisions as to purchase notices, the publication of notice of applications for planning permission and the rights of owners where application is made for planning permission.

CONSTITUTIONAL JURISDICTION IN THE FEDERAL REPUBLIC OF GERMANY

A constitutional court is an institution typical of a State organised according to federal lines. The chief task of such a court consists in settling legal disputes between the Federal State and its members as well as examining the compatibility of Federal and State legislation with the constitution. Consequently, unitary States such as Great Britain and France have no constitutional courts, whereas such institutions were established in Federal States like the United States of America, Switzerland, Austria, and, since 1951, in the German Federal Republic. The Supreme Court of the United States served as a model for the German institution.

The German "Federal Constitutional Court" ("Bundesverfassungsgericht") has its seat at Karlsruhe. It consists of two Chambers each of which is competent for distinctly limited areas of jurisdiction. They are practically two independent courts. Eight judges constitute each Chamber, half of whose members are elected by the Federal Parliament ("Bundestag"), the other half appointed by the Federal Council ("Bundesrat"), all of them for a period of eight years.

The Federal Constitutional Court extends its jurisdiction much farther than the Supreme Court of the United States, so that in Germany there is hardly any field of State authority that is not subject to the control of constitutional jurisdiction. The demand for a measure of judicial control of public administration was already satisfied in Germany in the course of the nineteenth century. Thus, by virtue of the Federal Constitutional Court, a control has been established that is extended to the entire field of legislative, of executive, and even to that of judicial power.

It is not surprising that the distinguished place occupied by the Federal Constitutional Court, especially as regards the review of the constitutionality of Parliament and Government action, is much disputed. In recent history it has been a common practice to infringe upon the principle of the separation of powers, as devised by Montesquieu, in favour of the legislative, as it occurred in countries of extreme parliamentarianism, or in favour of the executive power, an example of which may be seen in the Bismarck Reich in Germany. By the establishment of the Federal Constitutional Court, however, the Federal Republic makes a radical departure from the principle of separated powers in favour of the judiciary. Whereas its supporters think the Federal Constitutional Court a "Safeguard of the Constitution" and the "Crowning of the Constitutional State" its adversaries speak of an "Aristocracy of the Robe." Even slogans like "Judicialisation of Politics" and "Politicalisation of Jurisdiction" are used for its characterisation. A personal view of the pros and cons is not intended here. One may, however, take it for a matter of fact that the decisions of the Federal Constitutional Court are often political and that such a far reaching competence of a court cannot be accepted as an indispensable element of a constitutional State, since Great Britain and France have maintained the constitutional order of national life without such courts. Only the future can tell whether this system will prove itself to be successful.

The following groups of cases show the spheres of responsibility of the Federal Constitutional Court.

(a) Differences of opinion on the rights and duties of the Federal State ("Bund") and the Lands ("Laender"), as far as these differences refer to the rules of the constitution; also disputes among the Federal Organs on the constitutional competences or on the interpretation of the constitution, *e.g.*, a controversy between the President and the Parliament.

(b) Judicial review on the constitutionality of Federal and Land legislation as well as of that of the former German Reich, the so-called normative control ("Normen-Kontrolle"). There is a distinction made between an abstract and a concrete normative control.

The former is exercised if the Federal Government, one of the Land Governments or a third of the members of either the Federal Parliament or the Federal Council, initiates the review proceedings before the court. Nobody else is entitled to do this.

As to the concrete normative control, however, the decision will be made on motion of an ordinary German court. Should a court, in a pending lawsuit or in a criminal case, deem unconstitutional a certain law which if valid would have applied to the case before the court, proceedings must be suspended and the decision of the Federal

Constitutional Court on the constitutionality or unconstitutionality of the law in question must be obtained. According to Article 25 the general rules of International Law also form a part of the German constitutional law and create direct rights and duties for the inhabitants of the Federal Territory. (Through this Article 25 the German constitution has accepted the Anglo-American concept of International Law, with particular respect to its practice at the Nuremberg Trial of War Criminals, whereas the old German doctrine of International Law had been based upon the conviction that the rules of International Law were not pertinent to individual citizens, but that a special national law was required in this setting.) It may be concluded that if a judge considers a certain German law incompatible with a rule of International Law, he must obtain a decision to this respect from the Federal Constitutional Court.

(c) Every German or alien citizen, if he believes that his civil rights are violated through an act of the legislation, executive, or judiciary, may appeal to the Federal Constitutional Court. Such a far reaching protection of the individual citizen is a novelty in the history of German constitutionalism. With the exception of the Federal Republic, Austria and Switzerland, no other State has established a similar power for its individual citizens. This so-called constitutional grievance ("Verfassungsbeschwerde") has proved to be of great attraction to many groups in the population. Though most of the constitutional grievances which have been submitted to the Federal Constitutional Court are unfounded, it is hoped in Germany that the mere possibility of raising these grievances may induce public authorities to exercise their powers in accordance with the demands of justice and in a way which takes account of the interests of the individual. The emphasis lies not on the acts of judicial review themselves but on the educational effect of the institution as a whole. A complaint against a public authority must involve an allegation that a specific constitutional right has been violated. From this it can be inferred that the complaint is not sufficiently justified, if it merely alleges the violation of a general ideal, such as justice, liberty, equity, etc. It must be the complainant himself who is individually affected by the violation. Actions of the executive can only be challenged if all ordinary legal measures are exhausted. Actions of the judiciary can only be challenged if all other rights of appeal have been exercised.

(d) Finally, the Federal Constitutional Court is competent in a case of impeachment of the Federal President, and also for declaring a political party illegal on account of its subversiveness of the constitutional order. So far there has been no impeachment of the President of the Federal Republic of Germany, during the nine years'

presidency of Professor Theodor Heuss, whereas already two political parties have been declared unconstitutional, the Neo-Nazi Party "Sozialistische Reichspartei," in 1952, and the Communist Party in 1956.

WEDDIG FRICKE.

RHODESIA AND NYASALAND

A Case Note

By its first reported decision, *Luka v. R.*, 1956 R. & N. 1, the Supreme Court of the Federation of Rhodesia and Nyasaland overruled an objection taken on behalf of the Attorney-General of Nyasaland to the jurisdiction of the court to hear "*Luka's* appeal." Recently, in the case of *Gonthi v. R.*, 1958 R. & N. 35, the Supreme Court overruled a similar objection by the Attorney-General, even though legislation had meanwhile been passed designed to exclude such appeals from the jurisdiction of the court.

Both appellants had been convicted by a subordinate court in Nyasaland, had appealed to the High Court of the Territory, and, on their appeals being dismissed, had sought to appeal on questions of fact to the Supreme Court. In both cases it was contended for the appellant that jurisdiction was conferred on the Supreme Court by Article 56 of the Constitution of the Federation and legislation thereunder. For the Attorney-General it was said that the proviso to Article 56 operated: "... that the Federal Supreme Court shall not exercise that jurisdiction (to hear and determine appeals from the High Court of any Territory) in relation to any matter for the time being within the exclusive legislative competence of the Legislature of a Territory with respect to which a law of that Legislature provides that the decision of the High Court of that Territory is to be final." Now, Penal Code offences are without doubt "a matter . . . within the exclusive legislative competence" of the legislature of Nyasaland, and at the time of *Luka's* case, section 359 of the Penal Code of the territory read "Any person aggrieved by a decision of the High Court in its appellate jurisdiction . . . may appeal to the Rhodesia and Nyasaland Court of Appeal on a matter of law . . . but not on a matter of fact." The Supreme Court had no difficulty in deciding that this provision relating to a then non-existent court did not exclude its jurisdiction.

Before *Gonthi's* case the legislature of Nyasaland had amended section 359 simply by substituting the words "Federal Supreme Court" for "Rhodesia and Nyasaland Court of Appeal." The Supreme Court unanimously decided that, although it was competent for the legislature of Nyasaland to make a distinction between matters

of law and of fact, the decision of the High Court had not been made "final" within the terms of the proviso to Article 56. Thus although an appeal on matters of fact to the Supreme Court was precluded by the amended section 359, such an appeal was still possible to the Judicial Committee of the Privy Council, and the High Court's decision had not therefore been made "final."

In a long, leading judgment, Clayden F.J. considered the scheme of appeals provided for in the Federal Constitution by Articles 53-63. In particular he considered Articles 61-63: "The effect of the three articles in regard to appeals to the Privy Council can then be simply stated as follows. From a decision of the Federal Supreme Court there is no appeal as of right, unless the Federal legislature makes provision for it, but there is in all circumstances an appeal with special leave. From a decision of the High Court there is no appeal as of right at all, and special leave to appeal cannot be granted when there is an appeal to the Federal Supreme Court, or when a Federal or Territorial law provides that the decision of the High Court is to be final: but special leave to appeal can be granted when there is no intermediate appeal to the Federal Supreme Court and no valid statutory declaration of finality."

Pace the learned Federal justice, Articles 61-63, although as simply stated by him, disclose a highly complicated structure of appeal. Many decisions of the Privy Council on similar provisions in the constitutions of South Africa, Canada, Australia and the Indian Empire were relied on in argument and judgment, but despite these precedents the legislature of Nyasaland did not achieve its purpose. This is not surprising in such a complex system, topped as it is by the Privy Council, approachable by the dual ways of appeal as of right and appeal with special leave.

A. C. MACDONALD.

CANADIAN CASES

Professor Hood Phillips writes: In my recent review of the 2nd edition of Sawyer's *Cases on the Constitution of Australia* I implied that no comparable selection of cases had come from Canada. This remark does less than justice to Professor Bora Laskin's well-known *Canadian Constitutional Law*, published in 1951. Although Professor Laskin's book includes a certain amount of text as well as notes, and describes itself as being limited to the "Distribution of Legislative Power," it does in effect provide the same service for students of the Canadian Constitution as Professor Sawyer's book does for students of the Australian Constitution.

LETTERS TO MINISTERS AND PARLIAMENTARY PRIVILEGE

DONALD THOMPSON

MANY have watched with increasing concern the touchiness of members of Parliament in the many privilege claims, mostly rejected by the Speaker, which have been made since the war, and to them it is a great relief that, after some earnest heartsearching by the House of Commons, it has at last been decided that a letter written by Mr. Strauss to the Paymaster-General criticising the London Electricity Board was not covered by parliamentary privilege.¹ Since Mr. Strauss first raised the matter in the House on April 8, 1957, his claim of privilege raised first uneasy but restrained comment in the Press, and then, when upheld in the recommendations of the Committee for Privileges,² a storm of criticism in both editorial and correspondence columns. The most powerful contribution to the controversy was that of *The Times* in its first leader of July 8, 1958, on the very day that the House debated and ultimately rejected the report from its Committee for Privileges. The House appears to have heeded Press and doubtless public opinion in this instance.

The facts which gave rise to Mr. Strauss's allegation of a breach of privilege were simple enough. The National Association of Non-Ferrous Scrap Metal Merchants had complained without success to the London Electricity Board and to the then British Electricity Authority in 1954 about the Board's method of disposing of its surplus metal, *i.e.*, by inviting tenders on a basis which in their view was uneconomic to the Board and led to a monopoly amongst one or two dealers. Mr. Strauss had an indirect financial interest in the matter (it was very properly discounted by the Committee for Privileges). In February, 1957, Mr. Strauss wrote to the Paymaster-General requesting that he investigate the Board's methods; it was clear from his letter that he regarded the matter as one of day-to-day administration (for which Ministers refuse to answer) but hoped that as a matter of public importance and a scandal it would command the Minister's attention.³ The Minister declined responsibility but

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¹ H.C. Deb. (1957-58) 590, cols. 208-346

² Fifth Report from the Committee for Privileges, H.C. 305/57.

³ *Ibid.*, pp. viii-ix. The Minister responsible for matters of general policy, etc., is Lord Mills, the Minister of Power, but the Paymaster-General answers for Lord Mills in the House of Commons.

arranged for Mr. Strauss's letter to be brought to the attention of the Board.⁴

The result was a meeting between officials of the Board, Mr. Strauss and representatives of the trade concerned, followed by letters between Mr. Strauss and the Board, and eventually between their respective solicitors. The Board took the view that certain allegations made in Mr. Strauss's letter to the Minister were defamatory and when no apology satisfactory to them was received from Mr. Strauss, their solicitors announced their intention of serving a writ on him. The exchange of solicitors' letters was significant in that the Board's solicitors, having taken counsel's opinion on the question of privilege, thought that there was none. Mr. Strauss's solicitors took the view that the letter was written on an occasion of qualified privilege⁵; the issue at this stage was clearly not one of parliamentary privilege as far as the solicitors were concerned. Four days from the date of the letter announcing the impending service of a writ, Mr. Strauss raised the matter in the House, alleging that the threats to issue a writ were a breach of parliamentary privilege.

By a majority of five the House of Commons on a free vote rejected the report of the Committee for Privileges, which had concluded (a) that in writing to the Paymaster-General Mr. Strauss was engaged in a "proceeding in Parliament within the meaning of the Bill of Rights, 1689, and (b) that the threats of legal proceedings were threats to impeach or question Mr. Strauss in a court or place outside Parliament in respect of a proceeding in Parliament and were a breach of privilege." The Committee had recommended that the opinion of the Judicial Committee be sought on the question whether the Parliamentary Privilege Act, 1770, affected conclusion (b). The Judicial Committee advised that it did not, but was not asked to advise on anything but that narrow point.

The sequel to this decision by the House was that the Board announced its intention not to pursue the matter in the courts and instead asked the Minister of Power to hold an independent inquiry into the allegations which Mr. Strauss had made. The Minister agreed to do this and an eminent accountant was asked to undertake the inquiry. His report exonerated the Board from blame on all Mr. Strauss's allegations,^{5a} but made one suggestion for improving the Board's method of disposal, and, whilst rejecting any suggestion of improper motives on the part of the Board's purchasing staff, asked the Board to reconsider its approval of the practice which allowed members of the staff to accept Christmas gifts from scrap metal

⁴ *Ibid.*, p. x.

⁵ *Ibid.*, pp. xiv-xv.

^{5a} Cmnd. 605.

dealers. These suggestions were accepted by the Board. In the result, the Board's reputation was vindicated without the acrimony of a law-suit.

CONCLUSIONS OF LAW BY THE COMMITTEE FOR PRIVILEGES

A case of this kind raises once more the old but still fundamental question whether the House of Commons is the best institution to decide questions of privilege. The likelihood of the House of Commons considering this is extremely remote, however important it may seem to an outsider that the question be raised. Parliament's sense of its own dignity is too deep-rooted to permit the abdication of jurisdiction in law of privilege. Few matters excite the emotions of members more than such a suggested abdication. But it should be remembered that Parliament's historic struggle for its privileges was against the Crown on behalf of an at least partially representative legislature and that in those days before the independence of the judiciary was established there was good reason to fight against the courts' claim to jurisdiction. Nowadays it is generally believed that privilege exists for the protection of the public, and an independent judiciary which judicially notices the privileges of Parliament would seem to be fully capable of deciding whether privileges exist. Queen Elizabeth II is not likely to send messengers to the House to demand the arrest of unsympathetic members, nor are her judges likely to accept the view that she may lawfully do so.

Even in the dispassionate atmosphere of the Committee for Privileges—where one is at any rate free from large-scale debates and high-flown rhetoric—emotionalism reared its head when the Committee saw fit in its original draft to dwell on the struggle against Stuart tyranny.⁶ Any reference to Charles I and his search for the five members is capable of fortifying the waverer who wonders whether members are not claiming too much in the way of privilege. But this emotional approach is painfully out of place in modern conditions.

The Clerk of the House saw fit in his memorandum to the Committee to raise the old battle-standard of the 1837 resolution⁷—a resolution which had never been overruled but which no one outside the House would regard with satisfaction. Old cases must be cited whether they are satisfactory or not, but the Clerk went on to point out that to abandon the rights there proclaimed by the House "would be to strike an unprecedented blow against the privilege of freedom of speech which has been described as essential to every free Council or Legislature." The 1837 resolution declared "that by the law and privilege of Parliament, this House has the sole and exclusive

⁶ *Ibid.*, pp. xxv–xxvi, paras. 27–33

⁷ *Ibid.*, pp. 1–2.

jurisdiction to determine upon the existence and extent of its privileges, and that the institution or prosecution of any action, suit or other proceeding for the purpose of bringing them into discussion or decision before any court or tribunal elsewhere than in Parliament is a high breach of such privilege, and renders all parties concerned therein amenable to its just displeasure, and to the punishment consequent thereon.”⁸

If this resolution does in fact represent the “historic attitude” of the Commons, as the Clerk considered, the melancholy sequel to that resolution ought to make a present-day House of Commons pause before accepting it as a fundamental law for modern times. In any event it is an extravagant proposition that to allow a right of access to the courts in the case of a doubtful privilege would strike an unprecedented blow at the privilege of freedom of speech. However, in the emotional atmosphere created by the invocation of historic attitudes, Charles I and so on, the Committee, for all its closely reasoned arguments, overlooked several important legal points; little said in the subsequent debate is helpful in these matters.

The precise words of the Bill of Rights and of the 1837 resolution should be carefully considered. The former in section 9 provides that “the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament” and the latter speaks of “the *institution or prosecution* of any action, etc., *for the purpose* of bringing (parliamentary privileges) into discussion or decision before any court” (italics supplied). A threat to institute proceedings is obviously neither the institution nor prosecution of an action as a matter of plain interpretation. It is equally clear that such a threat does not impeach or question anything in the courts. In the Strauss case there was no discussion at all, according to the minutes of evidence before the Committee or in the debate, of the point that a threat to issue a writ falls outside the terms of the authorities relied on. The Committee concluded quite simply that the Board and its solicitors were “threatening to impeach or question the freedom of Mr. Strauss in a court or place outside Parliament.”⁹ The insertion of the additional words is an extraordinary method of statutory interpretation. The absence of any discussion on the point meant that the Committee reached this conclusion without having before them any authority parliamentary or otherwise for the proposition which they laid down, *viz.*, that the threats amounted to a breach of privilege.

⁸ 92 Commons Journals 419.

⁹ H.C. 305/57, p. viii, para. 20 (b). The point was mentioned in passing by the Attorney-General during the debate 590, col. 262.

As far as the terms of the 1837 resolution are concerned, it would seem that the words used require some sort of *mens rea*, which involves at least the foresight that a question of parliamentary privilege might be brought before the courts. When it appears that no issue of privilege is involved and the member concerned indicates that he has a defence of a totally different kind, it is submitted that the institution of proceedings is not for the purpose described in the resolution. The solicitors for the Board had indicated that in counsel's opinion no question of privilege arose, though it is uncertain whether they meant qualified privilege in defamation or parliamentary privilege, and Mr. Strauss's solicitors had in reply taken up a stand on qualified privilege. In these circumstances it is difficult to see how the Board and its solicitors could be said to have threatened legal proceedings *for the purpose* of bringing a question of parliamentary privilege before the courts; even greater, of course, is the difficulty in seeing how they had instituted proceedings for that purpose.

Even if one concedes that the interpretation of its privileges is the exclusive right of the House of Commons, it appears by now to be generally accepted that the House's function is to interpret and not to create privileges. Two important points of interpretation were entirely overlooked in the Strauss case. The third point, which was discussed at some length, was whether Mr. Strauss, in writing to the Minister, was engaged in a proceeding in Parliament within the meaning of the Bill of Rights. It is submitted that the gradual departure from the words of that statute is wholly unsupportable in law. The Report of the Committee on the Official Secrets Acts gave its blessing to the doctrine that matters closely connected with actual or expected proceedings should be regarded as proceedings in themselves.¹⁰ This is in itself an elastic interpretation, but in the Strauss case the Committee for Privileges held that a letter to a Minister might reasonably possibly cause a member to seek an opportunity to debate the matter raised and therefore was itself a proceeding in Parliament.¹¹ This is an even greater departure from the meaning of words in that what is expected to happen involves a greater degree of probability than what might reasonably possibly happen.

When Ministers have declined responsibility for particular matters, it can scarcely be said that a letter to a Minister relating to such a matter will involve that Minister if the matter is subsequently brought before the House. It is submitted that unless the subsequent proceedings in Parliament, if any, can involve the Minister, the letter to him cannot be said to be connected with those proceedings. Whilst it is possible to discuss matters of day-to-day administration in the

¹⁰ H.C. 101/39, para. 4.

¹¹ H.C. 305/57, p. vii, para. 11.

House,¹² this can scarcely be done in a way which involves the responsibility of the Minister, at any rate not in the instant case. Moreover, Mr. Strauss's letter was written with a full appreciation of the fact that he was raising a matter of day-to-day administration; his expressed hope that the alleged scandal would move the Minister from his customary denial of responsibility was, it is submitted, irrelevant to the question whether a subsequent attempt by him to raise the matter in Parliament could involve the Minister. The Committee made the point that the Minister's statutory power to obtain information from the Board rendered him answerable to Parliament for the due exercise of this power.¹³ But this power has never before been held to override the division of responsibility between Minister and Board as thrashed out in the House, and in any event, this would involve an extremely artificial view of what Mr. Strauss was doing. It is clear from his letter to the Minister that he was supplying information to the Minister and not asking the Minister to obtain it: he wanted the Minister to stop the Board from continuing its method of scrap-metal disposal, which was a matter far removed from the Minister's responsibility for his power to obtain information.

It is submitted that the Committee's interpretation of "proceeding in Parliament" was wrong in law, and the absence of the Minister's responsibility to Parliament in the Strauss case leads to the further conclusion that even if the definition be accepted, Mr. Strauss's letter to the Minister could have no closer connection with any subsequent remarks which he made in Parliament than a letter to *The Times* would have had, and could not therefore come within the definition. There were three points of law before the Committee apart from the one which it was recommended should be considered by the Judicial Committee. It is submitted that the Committee were wrong in their conclusions on all three in the light of the authorities which they purported to apply. The London Electricity Board had not instituted legal proceedings, and even if they had they had not done so for the purpose of bringing a parliamentary privilege into discussion or decision by the courts; nor, to put it the other way, had they

¹² See Erskine May's *Parliamentary Practice*, 16th ed. (1957), p. 361, for the position with regard to questions. These will not be allowed on matters of day-to-day administration unless the Speaker rules that they raise matters of urgent public importance. The conduct of nationalised industries may, however, be discussed on a motion for the adjournment; H.C. Deb. (1948-49) 465, col. 1063. The Speaker has also pointed out that there is wider scope in debates than at question-time, since the rules for debates are less strict: H.C. Deb. (1947-48) 449, col. 162. For examples of other opportunities to discuss detailed matters in debate, see Griffith and Street, *Principles of Administrative Law*, 2nd ed. (1957), pp. 287-288 H.C. 305/57, p. xxiii, para. 10; H.C. Deb. (1957-58) 590, col. 228 (Mr. Herbert Morrison).

¹³ H.C. 305/57, p. iii-iv, paras. 5-6; the power is conferred by the Electricity Act, 1947, s. 6 (4).

impeached or questioned Mr. Strauss's freedom in a court or place outside Parliament; and finally, Mr. Strauss was not engaged in a proceeding in Parliament.

THE POLICY OF THE COMMITTEE FOR PRIVILEGES

The unsatisfactory conclusions on the law emphasise, it is submitted, that the House is not the best institution in the land to determine legal issues. The Committee also overlooked an important point in the sphere of the House's own public relations; the House of Commons is, after all, an assembly of politicians. There was a respectable precedent for restraint in matters which might involve a conflict with the courts, and it was open to the House, with no loss of dignity, to instruct Mr. Strauss to plead parliamentary privilege in the courts and to await the courts' decision before considering whether any action by the House was necessary. This course would clearly command public respect and avoid conflict with the courts if the plea of parliamentary privilege was upheld.

The precedent for such a course is the decision of the House after that of the Court of Queen's Bench in *Howard v. Gosset*.¹⁴ Judgment on a technical point had been given against the Serjeant-at-Arms when executing a warrant authorised by the House in the exercise of its jurisdiction to commit for contempt. It was resolved by the House, without conceding jurisdiction to the courts, to seek the reversal of this judgment before defending its privileges by its own methods.¹⁵ The Committee did not have their attention drawn to this resolution in the Strauss case, but it would seem that the emotions of members in 1957 called for a show of strength as a result of a far weaker stimulus than their forebears of 1845 had successfully resisted. In its way the restraint of 1845 represented an attitude as historic as the aggressive resolution of 1837, and it is a pity that the attention of the Committee was not drawn to the way in which the House on the occasion of an adverse decision by a court had avoided open conflict without compromising its position in any way. It should be pointed out, however, that the Committee in the Strauss case recommended that no penal action be taken.

PARLIAMENTARY PRIVILEGE AND PRIVILEGE IN THE LAW OF DEFAMATION

During the debate in the House most members seem to have accepted the view that an honest belief in allegations made by a member to the

¹⁴ (1845) 10 Q.B. 359; reversed on proceedings in error (1847) 10 Q.B. 411.

¹⁵ Parl. Deb. (1845) 80, col. 1097, 81 col. 1208, and see the report of the Committee, 2nd Report on Printed Papers (1845) H.C. 397, p. vi.

Minister responsible gave rise to the common law protection of qualified privilege, and it can be said that the House gave earnest consideration to the question whether this protection was adequate. The Committee, on the other hand, had shown no interest in this question. It is submitted that this was rightly taken into account and that if the common law provides an adequate protection Parliament should interpret its privileges in such a way that the private citizen should be free to fight and lose his case in the courts without the fear of parliamentary reprisals.

During the debate there was, however, an attempt by a lawyer member to convince the House that members could not safely rely on the defence of qualified privilege. The contention was that malice in a member's informant would be imputed to the member if he passed on the allegations made to him.¹⁶ This argument was not specifically demolished, although the Attorney-General indicated his dissent. Whether members accepted the argument or not, they may well have felt that it was not safe to rely on qualified privilege in view of the lawyers' inability to agree.

With respect, it seems clear beyond doubt that the argument was wrong. There is authority, bloody but unbowed, for the proposition that if two or more persons are jointly concerned in the publication of a libel and only one has the requisite interest in publishing the statement¹⁷ the malice of that person deprives the others of the defence of qualified privilege. It has been decided that this rule does not apply where the other defendant(s) also has or have the requisite interest.¹⁸ The member and his informant would not in any event be jointly concerned, and their interests are so obviously separate that the member's could not be said to be derived from that of his informant. As far as the member's interest is concerned, it has long been the law that complaints about public officials, if made to the proper authority, are protected.¹⁹ It need aggrieve no member that he shares this protection with the ordinary citizen.

There is, however, one difficulty in the defence of qualified privilege which was not discussed. It is not sufficient that a complaint is made to the person who is honestly or even reasonably believed to be the appropriate authority—it must in fact be made to the right person.²⁰ For this purpose it does not matter whether the correct

¹⁶ H.C. Deb. 590 (1957–58), col. 264 (Mr. R. T. Paget, Q.C.). This point was further discussed in ensuing correspondence to *The Times* virtually for the remainder of July, 1958.

¹⁷ *Smith v. Streatfeild* [1913] 3 K.B. 764.

¹⁸ *Longdon-Griffiths v. Smith* [1951] 1 K.B. 295.

¹⁹ *Harrison v. Bush* (1855) 5 E. & B. 344. The interest of a member in receiving complaints is shown in *R. v. Rule* [1937] 2 K.B. 375.

²⁰ *Hebditch v. MacIlwaine* [1894] 2 Q.B. 54, C.A.; however, there are two decisions of the Court of Appeal that a bona fide belief that the recipient has an interest

Minister of the Crown is approached,²¹ but it clearly does matter if no Minister is the appropriate person.

The precise relationship between Ministers and nationalised industries is not yet clear, and it is not always easy to distinguish matters of principle (which are the Minister's responsibility) and matters of day-to-day administration (which are not). If qualified privilege is to be the only protection available to the member, it seems necessary to modify this particular rule of law for the protection of communications which are directed in good faith to the wrong person.

It may incidentally be pointed out that there is rather more to the distinction between privilege in defamation and parliamentary privilege than legal writers would have us believe. The relevance of malice in the case of qualified privilege is an obvious difference, but it is still possible to distinguish absolute privilege in defamation from parliamentary privilege although malice is irrelevant to both. Absolute privilege is a defence to the action but is not a bar to the jurisdiction of the courts, whereas if the courts accept the existence of a parliamentary privilege they have no jurisdiction.²² Moreover the 1837 resolution lays down that it is a punishable breach of privilege deliberately to litigate a parliamentary privilege, whereas judgment for the defendant on the ground of absolute privilege involves no such consequences. It should be noted that both the Bill of Rights, 1688, s. 9, and the Parliamentary Papers Act, 1840, s. 1, deprive the courts of jurisdiction.

The distinction between a defence and an absence of jurisdiction could be significant in a case where a defendant was restrained by interlocutory or perpetual injunction from further publication of a libel. In such a case it is arguable that publication on an occasion privileged in the law of defamation would amount to a contempt, even in a case of absolute privilege, *e.g.*, to one's solicitor,²³ and even, in the case of an interlocutory injunction, if a plea of justification eventually succeeded. But if an M.P. had been restrained from further publishing a libel, *e.g.*, after he had written to the Press, it seems clear that if he then made the allegations in a parliamentary proceeding the court could not commit him for contempt.²⁴

is sufficient: *Clark v. Molyneux* (1877) 3 Q.B.D 237 and *Waller v. Loch* (1881) 7 Q.B.D. 619. Both these cases were cited with approval by Lord Atkinson in *London Association for Protection of Trade v. Greenlands* [1916] 2 A.C. 15, 36, H.L. In all three cases, however, the circumstances were that the recipient had requested information, and this may distinguish them from *Hebditch v. MacIlwaine*. Could Mr. Strauss be said to believe that the Minister was the person to whom he should make his complaint?

²¹ *Harrison v. Bush*, *supra*, at pp. 350-351.

²² *Cf. Rivlin v. Bilainkin* [1953] 1 Q.B. 485, 487, *per* McNair J.

²³ *More v. Weaver* [1928] 2 K.B. 520, C.A. Whether the privilege was absolute was left open by the House of Lords in *Minter v. Priest* [1930] A.C. 558.

²⁴ See *Rivlin v. Bilainkin*, *supra*, at p. 488; citing *Wilkes Case* (1763) 19 St.Tr. 981.

ATTITUDES TO PRIVILEGE

Most lawyers and most sections of the Press have obviously welcomed the rejection of the Committee's report by the House. It has already been suggested that there was cause for dissatisfaction in the method by which the Committee arrived at their conclusions, but, quite apart from the actual result, there were some very welcome features in the deliberations of both.

First, the Committee did obtain judicial advice on one of the points of law, though not, of course, on the extent of the privilege. The Committee would merely have followed the 1837 resolution if they had taken the view that the question on which the advice of the Judicial Committee of the Privy Council was taken was one exclusively for the House itself: that question was whether the House would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the threat of a writ as a breach of privilege. Reference of this very narrow point of law to the judges left the vital questions in the case with the Committee, and in any event the Judicial Committee's advice was not technically binding, but this was a manifestation, albeit small, of an earnest desire to keep within the law as interpreted by the judges.

Secondly, there was the unusual spectacle of the House asking itself, or at least some members asking themselves and the House, whether the interest of a member is synonymous with the public interest.²⁵ The debate in the House showed a reluctance to accept the doctrine that the convenience of members, even in the course of their functions, automatically attracts the protection of privilege. The right of a citizen to protect himself in the courts from malicious attacks on his reputation was eventually considered more important than the protection of a malicious member whose conduct could not be dealt with by the House. It should be emphasised that at no time was it suggested that Mr. Strauss had been actuated by malice; the House merely decided that letters to Ministers in the circumstances of the Strauss case should be exposed to the rules of common law, where malice would deprive their authors of any protection. It seems a fair assumption that one of the factors taken into account by the majority of the House was the absence of the House's disciplinary jurisdiction over members who abused their privilege by making scurrilous allegations during its actual proceedings.²⁶ Privilege carries with it grave responsibilities to the House; indeed, the reasonableness of a member's belief in allegations which he makes can be relevant in the House though not in the courts.

²⁵ *e.g.*, Sir G. Nicholson, H.C. Deb. 590, col. 281; Mr. Dingle Foot, Q.C., col. 298.

²⁶ See *ibid.*, col. 264 (the Attorney-General).

The result of the Strauss case is purely negative, and its main value appears in the attitudes to privilege which are revealed. It is not often that the House of Commons searches its conscience to examine the basic justification of privilege. Clearly, it is not possible to say that no letters to Ministers are privileged, since the Speaker, at any rate, has taken the view that privilege covers a letter written to a Minister in response to his invitation made during a parliamentary proceeding.²⁷ The sheer impossibility of disentangling the *ratio decidendi* of a privilege case from *obiter dicta* leaves it uncertain whether a letter to a Minister who *was* politically responsible for the matter would raise a different question. The House's technique in deciding privilege cases is such that one must bear in mind, as the Attorney-General pointed out,²⁸ that not every word in a report from the Committee of Privileges should be regarded as law when the House resolves that it agrees with its Committee. A rejection of a report, on the other hand, decides very little.

PROBLEMS FOR THE FUTURE

The case has raised two very important questions which have still to be resolved and which will, no doubt, be discussed in the House fairly soon. One is the question whether letters to Ministers should be privileged; all that is so far decided is that some are not. The other is the more intractable problem of defining with sufficient precision the proper sphere of parliamentary control of the nationalised industries.

Letters to Ministers are, on the whole, the result of a desire first and foremost to redress some administrative scandal or peccadillo; questions in the House sometimes spring from a desire to make political capital out of the situation. The method which is favoured by those whose primary concern is to have matters rectified with as little fuss as possible should not be discouraged. It would be a great pity if the fear of legal action induced members to crowd the order paper with questions which could satisfactorily be dealt with elsewhere. But honest members may still make allegations to a Minister without fear, and the debate in the House showed that many members had no fear of legal proceedings. However, the Committee and Mr. Strauss made a good point when they urged that a member may find himself out of pocket even when he successfully defends the action.²⁹ The harassing of which Mr. Strauss spoke need really cause no member to lose his sleep. It is to be hoped that the House will not create a new privilege simply in order to ensure that members are

²⁷ H.C. Deb. 591, cols. 811-813.

²⁸ H.C. Deb. 590, cols. 254-257; see also col. 294 (Mr. Pickthorn).

²⁹ H.C. 305/57, pp. xxiv-xxv, paras. 20-21.

not out of pocket; reimbursement by the Treasury would be worth the cost to public funds.

The relationship between Parliament and the nationalised industries has already been discussed several times by the House of Commons.³⁰ Both the Labour and the Conservative governments have taken the view that Ministers should answer only for matters of general policy and that matters of day-to-day administration are the responsibility of the particular industries themselves. There is an obvious difficulty in drawing this distinction, but further difficulty has been created by the reluctance of the House of Commons to abandon its position of watchdog over day-to-day administration. Unless the Speaker rules that a question raises a matter of urgent public importance no question on day-to-day administration will be answered, either because it is disallowed or because the Minister refuses to answer.³¹ But it is possible to discuss these matters in debate,³² although this is no guarantee of a reply from a Minister. Further, the House has recently shown its dislike of terms of reference for Select Committees on Nationalised Industries when these terms have excluded matters of day-to-day administration. This restriction was omitted from the terms of reference of the Sessional Committees for 1956-57 and 1957-58.³³

It is, then, possible to discuss day-to-day administration in the House but very difficult, apart from adjournment debates, to overcome the procedural difficulty of discussing a matter of detail of immediate concern though not of urgent public importance. Debating accounts and reports, etc., is almost inevitably inadequate for this purpose, and questions will not be answered. Letters to Ministers, privileged or not, will also fail to produce a response, as Mr. Strauss's letter failed. It is difficult to resist the conclusion reached by the Speaker that in the last resort only a Minister can say whether a matter is one for which he is responsible.³⁴ Many members appear dissatisfied with their inability to take up a particular question with a Minister, and the House as a whole has clearly decided

³⁰ See, e.g., H.C. Deb. (1947-48) 448, cols. 391-456; 449, cols. 169-172, 1630-1634.

³¹ No Minister is obliged to answer any question: Parl. Deb. (1897) 47, col. 60. Refusals to answer questions on nationalised industries, if disallowed, are so disallowed because of the rule against raising questions to which an answer has been refused, a rule which applies to questions of the same class: H.C. Deb. (1947-48) 449, cols. 1630-1634. Although Ministers' refusals have always been on the ground that matters of day-to-day administration are not their responsibility, the rule that questions may not be asked in respect of matters which are not the Minister's responsibility (Private ruling of August 4, 1924) has never been invoked by the Speaker.

³² See note 12, *supra*.

³³ See Erskine May, *op. cit.*, pp. 858-859; and H.C. Deb. (1956-57) 562, col. 1595; and (1957-58) 578, col. 1248.

³⁴ H.C. Deb. (1947-48) 446, cols. 1816-1817.

that it is desirable that through Select Committee reports it can exercise some control through criticism of day-to-day administration.

The present arrangements appear, on the whole, to work satisfactorily as far as they enable commercial undertakings to carry on their own business without detailed direction from Whitehall. Few would wish to see them run on civil service lines. If ginger-groups are needed they should exist outside Parliament and their complaints should be aimed at the particular nationalised industry itself.

This observation is made only on the hypothesis that Ministers do not in fact direct the industries on matters of detail, but there is a good deal of evidence that Ministers use their authority where they decline to accept responsibility³⁵: "suggestions" by Ministers in oral discussion cut right across both the scheme of responsibility envisaged in the Constituent Acts and the external aspect of the relationship as described by Ministers. Mr. Strauss had no illusions about this from his own ministerial experience, for he told a Select Committee that in his weekly discussions with members of the Iron and Steel Corporation they "considered every single problem, not only of national interest but on every conceivable detail. There was not a single problem with which he was not concerned."³⁶ The knowledge that this happens is perhaps at the root of the dissatisfaction with Ministers' refusals to accept responsibility. But as long as the business of government is conducted in private this unsatisfactory state of affairs will continue; lack of information about the activities in Whitehall is a cross which every member knows he must bear.

³⁵ This point is made and the practice criticised by Davies in "Ministerial Control and Parliamentary Responsibility of Nationalised Industries," 21 *Political Quarterly* (1950), 150.

³⁶ H.C. 120/55-56, p. 36 (Minutes of Evidence before Select Committee on Nationalised Industries).

PARLIAMENT AND BOUNDARY COMMISSIONS

JAMES T. CRAIG

THE House of Commons (Redistribution of Seats) Act, 1944, "An Act to make temporary provision for the division of abnormally large constituencies . . . and permanent provision for the redistribution of seats at parliamentary elections,"¹ is a kind of watershed. Before 1944 there was a long period of "*ad hoc*" distribution of parliamentary seats, characterised by relatively infrequent legislation in the matter and, from 1944 onwards, an era of seat distribution based on enacted rules applied by permanent and independent bodies, and characterised by considerable legislative activity. And the Act, which embodied the recommendations relating to redistribution of the Vivian Committee² and the 1944 Speaker's Conference on Electoral Reform,³ displays this in its form for, while establishing rules for the *future* determination of constituencies, it also specifies certain constituencies.⁴ It remains true, however, that this latter feature was limited in scope and was the temporary aspect of the Act in that it applied to the "abnormally large constituencies," and the real significance of the Act was the establishment of *permanent* machinery in the form of four separate Boundary Commissions, one each for England, Wales, Scotland and Northern Ireland "charged with the duty of reviewing the state of constituencies periodically, preparing schemes of redistribution in accordance with certain principles prescribed by Parliament itself, and submitting such schemes for the approval of Parliament."⁵

The 1944 Act was amended by the House of Commons (Redistribution of Seats) Act, 1947,⁶ and these two Acts, together with certain matters relating to constituencies contained in the Representation of the People Act, 1948,⁷ were consolidated by the House of Commons

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¹ 7 & 8 Geo. 6, c. 41.

² Committee on Electoral Machinery. Report, Cmd. 6408 (1942).

³ Cmd. 6534.

⁴ The Second Schedule specifies twenty constituencies with electorates on 1939 figures of over 100,000 and indicates the number of constituencies into which they are to be divided. Two of the constituencies had electorates exceeding 200,000. The actual boundaries of the new constituencies were to be recommended by the Boundary Commission.

⁵ The Home Secretary so described the object of the Bill to Parliament. *House of Commons Debates*, Fifth Series, 1943-44, Vol. 403, col. 1612.

⁶ 10 & 11 Geo. 6, c. 10.

⁷ 11 & 12 Geo. 6, c. 65.

(Redistribution of Seats) Act, 1949,⁸ which is now the Principal Act but which has been modified by the House of Commons (Redistribution of Seats) Act, 1958.⁹

There are certain obvious advantages in the establishment of permanent independent machinery to determine the existence and limits of parliamentary constituencies by the application of known and enacted rules. The opportunity for manipulating constituencies for party advantage is diminished and any such attempts at "gerrymandering" ought to be the more readily identified. Not only can this advantage be gained but it *appears* to be gained, and this is just as important in that it ought to help reduce resentment felt about particular constituency changes. Not only that, but disagreement, discussion and debates can be more honest and more fruitfully centred on the principles and the rules rather than on specific constituency changes, discussions on which are less likely to be free of self-interest.¹⁰ And the existence of permanent machinery applying established rules provides a check to the vast discrepancies between constituencies, resulting in apparently inequitable representation which was so familiar before the 1944 Act, and, indeed, the remedying of which was so urgent that the Act contained special measures to deal with these abnormally large constituencies.

But the mere existence of permanent and independent machinery applying established rules is not in itself sufficient to achieve these politically desirable ends. Quite apart from the substance of the rules certain other minimum requirements appear to be necessary. The rules must not undergo frequent change, particularly changes brought about by successive governments of differing political beliefs and, to this end, the principles on which the rules rest must be clearly and exhaustively analysed before the rules are first brought into operation. In the second place, whether changes in the rules are necessary or not, the machinery charged with applying the rules must neither canvass changes nor become involved in the making of them, because it is most likely that political parties will make use of such canvassing, perhaps in self-interest, but even if not, any charges of "gerrymandering" by political parties will ultimately involve and threaten the machinery itself.

The following analysis is concerned with changes that have been made to the rules for redistribution originally prescribed by the 1944 Act and the part played by the Boundary Commission for England

⁸ 12 & 13 Geo. 6, c. 66.

⁹ 6 & 7 Eliz. 2, c. 26.

¹⁰ It must be admitted, of course, that so long as Parliament has to legislate for the actual constituency changes, as it has under these Acts, by Order-in-Council, there will be discussion on the actual constituency changes, but this does not affect the validity of the general argument.

in bringing about these changes. It is submitted that the advantages of a system of independent machinery applying established rules have been placed in jeopardy by the machinery involving itself in the determination of the principles and rules to be applied. The Boundary Commission for England has undertaken a function for which it has no statutory authority, namely, advising and working to bring about changes in the rules¹¹ and, by reason of the inappropriate structure and powers of the Boundary Commissions to fulfil this function, resulting in rules of conflicting testimony, the consequences of which are likely to arouse political and national sentiment.¹² The analysis is concerned with three important aspects of the rules and the relevant changes brought about since the 1944 Act became law. These are (i) the interval between reports of the Commissions, (ii) the "local unity" or "local government boundaries" rule, and (iii) the Electoral Quota.

THE INTERVAL BETWEEN REPORTS OF THE COMMISSIONS

This is perhaps not accurately described as a "rule" in the sense of "rules for the continuous redistribution of seats" as described by the Act, in that, whereas the "rules" are contained in a Schedule and described as the "rules," the provisions regarding the interval between reports are contained in the body of the Act. But it is one of the most recent changes and was clearly instigated by the Boundary Commission for England.

The 1949 Act determined that the interval between reports from the Commissions would be not less than three years or more than seven, with the proviso that if no changes were recommended the minimum period would be six years, but the Commissions were also entitled to submit a report at any time regarding a particular constituency or constituencies.¹³ These provisions were contained in the 1944 Act and remained undisturbed until the 1958 Act. This Act increases the interval between reports by raising the minimum from three to ten and the maximum from seven to fifteen years.¹⁴

¹¹ There is no suggestion in any of the Acts that the Commissions have a duty or have authority to make recommendations on the substance of the Act. The study of debates in the House of Commons indicates that there is a feeling, not only that this is a function of the Commission, but that legislation should necessarily be based on such recommendations. The use of the word "recommend" in the Acts in relation to proposed *constituency* changes may help to account for this.

¹² It is not suggested that the rules were anywhere near perfect in the first instance. It need not even be argued that they have not been improved—although this is open to doubt. It is argued that the important benefits of permanent and independent machinery have been sacrificed by the machinery meant to apply the rules successfully bringing about changes in the rules. Whether the rules have been improved or not is of less moment.

¹³ s. 2 (2) (3).

¹⁴ s. 2 (1).

It was the Boundary Commission for England that gave expression to the desire for a longer interval between reports and advocated such an extension. In its First Periodical Report¹⁵ the Commission says: "In the course of our deliberations two matters of considerable importance *arising out of our terms of reference*¹⁶ have been brought to our notice and we venture to draw attention to them. The provisions of the Act of 1949 require that our next periodical report must be submitted not less than three or more than seven years from the date of submission of this report. Considerable comment has been made in the press and elsewhere to the effect that the general review of constituencies now concluded and the changes recommended as a result of that review have come too soon after the very considerable changes brought about by the Representation of the People Act, 1948. . . . The provisions of the Act of 1949 left us no alternative but to proceed with the review and to make such recommendations as we considered necessary and desirable. Nevertheless, we have been impressed by the arguments put forward against reviews at comparatively short intervals and we think that consideration should be given to lengthening the minimum and maximum periods between reviews."

It is not the task to consider the merits of this argument or the soundness of the premises on which it rests.¹⁷ The significance lies only in the fact that the Commission urged such a change, not only strenuously, but successfully. The change was brought about by the Act of 1958, and its passage through the House demonstrates the willingness of the Government to attribute the change to the Boundary Commission for England. In moving the Second Reading of the Bill the Home Secretary was able to say: ". . . as suggested by the Boundary Commission for England in paragraph 19 of its First Periodical Report, the interval between general reviews should be lengthened. While we may hear some argument in the course of the discussion today, there is no doubt that there is a considerable body of evidence, both in the House and in the Report of the Boundary Commission, in paragraph 19, that the interval between these general reviews should be lengthened."¹⁸ Thus the views of the Boundary

¹⁵ Cmd. 9311 (1954), p. 4, para. 19.

¹⁶ Italics mine. In view of the argument to be developed the particular words used are of interest.

¹⁷ Nevertheless, the view was based on rather short and limited experience covering the unique situation created by inter-party disagreement and inactivity before the war and the greatly changed incidence of population caused by war and immediate post-war conditions. It will be seen, as the argument is developed, that it might not be too cynical to say that the Commission, while working successfully for increased intervals between reports, worked equally successfully to bring about changes in the rules more frequently. It is open to the comment that the constituencies should not often be changed, but the rules should.

¹⁸ *House of Commons Debates*, Fifth Series, 1957-58, Vol. 582, col. 228.

Commission for England prevailed in the House of Commons, and it is perhaps significant that it was the views of *one* Commission, the Commission associated with the dominant and most influential partner in the United Kingdom. The Commissions for Scotland, Wales and Northern Ireland made no comment on the provisions of the Act determining the interval between reviews, though whether occasioned by their interpretation of their terms of reference and the limits of their authority, rather than satisfaction with the situation as it was, must remain in some doubt.¹⁹

LOCAL UNITY OR THE "LOCAL GOVERNMENT BOUNDARIES" RULE

The 1944 rules²⁰ introduced an innovation to British constitutional practice in the matter of determining constituencies. This was an arithmetical formula known as the Electoral Quota whose function was to provide a norm for the attainment of some degree of numerical equality of constituency electorates. There was also a rule, Rule 4, which attempted to limit deviations above or below this norm to 25 per cent. of the norm. But this rule was expressly made subject to Rule 1 which established a norm for the overall representation of the United Kingdom.²¹ It was also subject to Rule 6 which provided that "special geographical considerations, including in particular the size, shape and accessibility of a constituency" permitted a departure from the strict application of Rule 4, the "25 per cent." rule. Rule 5, which provided for consideration of certain local government areas—the "local government boundaries" rule—was also subject to Rule 6 and, in addition, was also *made subordinate to Rules 1 and 4* by being prefaced by the words, "So far as is practicable having regard to the foregoing rules. . . ."

The 1944 Act was amended by the House of Commons (Redistribution of Seats) Act, 1947: "An Act to relax the rules set out in the Third Schedule to the House of Commons (Redistribution of Seats) Act, 1944, so far as they relate to the application of the electoral quota. . . ." This Act removed Rule 4, the rule "which limits the electorate of a constituency to not more than a quarter above or below the electoral quota and to which Rule 5 as to conformity with local government boundaries is subject."²² Rule 5A was substituted: "The electorate of any constituency shall be as near the electoral

¹⁹ It is suggested elsewhere that the former view is the correct one. It is at least the only fair assumption in the absence of clear evidence to the contrary.

²⁰ The Third Schedule to the Act.

²¹ By providing that the constituencies in Great Britain should not be "substantially greater or less than 591." Scotland had to have "not less than 71" and Wales "not less than 35." Northern Ireland constituencies were additional to the norm for Great Britain and their number was fixed at 12.

The University constituencies were additional to these prescribed figures (s. 6).
²² s. 1 (1) (a).

quota as is practicable *having regard to the foregoing rules*; and a Boundary Commission may depart from the strict application of the last foregoing rule if it appears to them that a departure is desirable to avoid an excessive disparity between the electorate of any constituency and the electoral quota, or between the electorate thereof and that of neighbouring constituencies in the part of the United Kingdom with which they are concerned.”²³ Not only did this repeal Rule 4, the “25 per cent.” rule, but by putting the new Electoral Quota rule after Rule 5, the “local government boundaries” rule, and including the provision, “having regard to the foregoing rules,” subordinated the application of the Electoral Quota to considerations of local government areas while leaving the Commissions with a discretion in the matter.

Now the Commissions had started their task under the 1944 rules and all of them had published provisional recommendations by the time of the amended rules of 1947. However, the 1947 Act postponed the enumeration date for one year²⁴ and the Initial Reports were made under the 1947 rules but, as will be seen, this did not prevent two of the Commissions from disclosing their part in bringing about the 1947 amendments.

In both the Initial Report of the Boundary Commission for England and the Initial Report of the Boundary Commission for Wales²⁵ approval is expressed at the abolition of Rule 4, the “25 per cent. rule.” The Commission for England says: “We found that it was not practicable to give effect to this rule [Rule 4], having regard to the limiting provisions of Rule 1, *without disturbing the unity of local government areas*.” The Boundary Commission for Wales expressed similar sentiments regarding Rule 4: “. . . in some instances we found that it was not practicable to give effect to this rule, having regard to the limiting provisions of Rule 1, *without disturbance of local unity*.”²⁶ It is evident from this that both Commissions had a high regard for “local unity” and it is equally evident that they attributed their difficulties to the application of the Electoral Quota in terms of Rule 4. But in terms of the 1944 Act Rule 4 did not create the difficulties for the Boundary Commissions. The difficulties were created by the Commissions according a higher priority to “local unity” as expressed by local government boundaries than was accorded by the rules in the Act. The rules were clear.

²³ s. 1 (2).

²⁴ s. 1 (4). This subsection also provided that the Initial Reports of the Commissions were to be made under the amended rules.

²⁵ Cmd. 7260 (October, 1947) and Cmd. 7274 (November, 1947) respectively.

²⁶ *Ibid.*, p. 4, para. 8 of both Reports. Italics mine. The words used in the reports, “local government areas” and “local unity” are illuminating. They may not be exactly the same thing although it has long been taken in relation to parliamentary representation that the latter is expressed by the former. (See also note 28.)

If there was to be any departure from the norms expressed by the rules the departure had to be at the cost of "local unity." Rule 4, which applied the Electoral Quota, was expressly subordinated to the rule which determined the overall representation for the United Kingdom, Rule 1, by being prefaced by the words, "So far as is practicable having regard to Rule 1 . . ."; and Rule 5, the "local unity" rule, was subordinated to both Rules 1 and 4 by the words, "so far as is practicable having regard to the foregoing rules. . . ." ²⁷

There was no doubt as to the duty of the Boundary Commissions when confronted with the choice of disturbing "local unity" or applying the Electoral Quota and, whatever may be the merits of the "local unity" factor, particularly in view of British traditions in this matter, it seems indisputable that these Boundary Commissions wished to give greater weight to one rule than Parliament had accorded to it. ²⁸

If this analysis is correct the Boundary Commissions for England and for Wales disputed the merits of an enacted rule and urged the substitution of another rule by asserting difficulties in the application of the enacted rules, such difficulties existing only because of their own predilections regarding the factor of "local unity."

In addition to the canvassing of the merits of "local unity" as opposed to the Electoral Quota in these two Initial Reports there is further evidence to be found in Parliamentary Debates as to the wishes of the Boundary Commissions, or, at least, the Boundary Commission for England. The Home Secretary, in moving the Second Reading of the 1947 Bill, said: "Now I found—and I have their permission to say it—that the Commissioners had felt themselves gravely handicapped by the strict mathematical formula within which

²⁷ Although it is not relevant for the argument at this stage, both Rules 4 and 5 were subordinated to Rule 6: "A Boundary Commission may depart from the *strict application of the last two foregoing rules* if special geographical considerations, including in particular the size, shape and accessibility of a constituency appear to them to render a departure desirable." Probably Scotland has derived the greatest benefit from this rule and its force.

²⁸ The Commission for England seems to have worked towards the end that the "local government boundaries" rule should be limited only by the relative limitation effected by the norm for overall representation of the United Kingdom. (Now enacted—see below.) This rule is not now even subject to the new presumption against a change in a constituency unless there is a strong case for it (see below).

A charge has also been made that the Commission for England is more concerned about county boundaries than any others. This was discussed at length during the Committee stage of the 1958 Bill. And the arguments suggest that county boundaries were not only put before other local boundaries but also before other considerations. (*House of Commons Debates*, Fifth Series, 1957–58, cols. 603–704.) However this may be, it is perhaps legitimate to put a question mark against a rule which dramatically increased the force of local government boundaries when these boundaries were themselves under review and were being subjected to change, changes, some of which were, and still are, causing certain misgivings. See Local Government (Boundary Commission) Act, 1945 (8 & 9 Geo. 6, c. 38) (Commission dissolved in 1949 by 12, 13 & 14 Geo. 6, c. 83). And see the Local Government Act, 1958 (6 & 7 Eliz. 2, c. 55).

their activities have been confined, and therefore the present Bill has been introduced in an effort to make the future representation of this House more in accordance with the historic precedent of representing communities than would have been possible under the Act of 1944.”²⁹ And in an earlier statement to the House, as well as referring to consultations with the Chairman of the four Commissions, namely, the Speaker of the House of Commons,³⁰ the Home Secretary, speaking of the unforeseen results of the Rules contained in the 1944 Act said: “This result follows not from any failure on the part of members of the Boundary Commission to recognise the objections to breaking up the unity of such communities, but from the stringency of the provisions in the Act. . . .”³¹ Thus the views expressed in the Initial Reports of the Commissions for England and Wales prevailed in the House of Commons.

This change in the rules, for which the Home Secretary could find authority and justification in the wishes of the Commissioners, illustrates the two main dangers of the political arena to which the whole structure of the distribution machinery is exposed as soon as a Commission participates in discussion of the merits of the rules to be applied. When the Home Secretary made his statement regarding the proposed new rules the Leader of the Opposition asserted that the proposals were “flagrant and shameful gerrymandering.”³² It may not be important that such accusations are made about party leaders but it should be realised that a Minister’s ability to argue that the changes in the rules were urged by a Boundary Commission will not eliminate such accusations but will merely cause them, ultimately, to be directed at the Commissions. This will obviously tend to destroy one of the most important attributes of the whole system. And it will be aggravated if there is even a suspicion that the Commission is exceeding its authority in canvassing such changes.

The other danger is that a single Commission may well advocate rules which seem to be inappropriate for the conditions in the other countries of the United Kingdom. This, too, will be aggravated by the fact that there seems to be no statutory authority for Commissions to make recommendations about the rules. Not only can national feelings engender criticism of the whole machinery when the wishes of the Commission associated with the dominant and most influential

²⁹ *House of Commons Debates*, Fifth Series, 1946–47, Vol. 431, col. 1560.

³⁰ The Speaker of the House of Commons is the Chairman of each of the four Commissions, although, by virtue of his other great duties, it seems to be accepted that he is the “nominal” chairman only. It is of interest that the 1958 Act alters the composition of the Commissions, particularly in relation to the appointment of the Deputy Chairman. All four Commissions are now to have a judge as Deputy Chairman, thus following the Scottish practice. See the point made about the position of the Speaker at Vol. 582, col. 285.

³¹ *House of Commons Debates*, Fifth Series, 1946–47, Vol. 430, col. 77.

³² *Ibid.*, col. 79.

partner in the United Kingdom appear so authoritative, but there is a real problem in the lack of statutory authority to urge changes in the rules, because a Commission conscious of the limits of its statutory authority—not to mention a realisation that it is familiar with the problems and aspirations of only one of the four countries—may well refrain from discussing the rules, not because it endorses the views advanced by another Commission, but because it considers that it has no authority to canvass alterations in the rules as well as a legal duty to apply the rules without criticising them.³³

Neither the Commission for Scotland nor the Commission for Northern Ireland expressed the dissatisfaction that the Commissions for England and Wales expressed. Indeed, it was suggested in Parliament that Scotland had no objections to the rules as they stood and, although it might have been expected that the Commission for Scotland would experience greater difficulty in applying the “25 per cent.” rule than that of England or Wales because the “average electorate” in Scotland was considerably lower than the Electoral Quota,³⁴ the Commission for Scotland pointed out in their Initial Report that they had not even been obliged to make use of the limited discretion regarding the “local unity” rule provided by the 1947 Act: “In no case did we find it necessary to make use of the qualified permission given by rule 5A to depart from the strict application of rule 5.”³⁵

Although the change of rules, while allowing the Commissions for England and for Wales to achieve their ends, does not appear to have affected Scottish constituencies, it clearly exercised an effect on constituencies in Northern Ireland. For purposes of its own Parliament³⁶ at Stormont, Northern Ireland is divided into constituencies which are much smaller than the constituencies for representation in the Imperial Parliament, and it is clear that there is a considerable disadvantage, not only for political organisations but for the ordinary citizen, in any failure to ensure that a given “local”³⁷ parliamentary constituency is wholly contained in one Imperial Parliament constituency. And

³³ There are passages in the reports of the Commissions for Scotland and for Northern Ireland suggesting that the latter view is correct. Insofar as the Commission for Scotland is concerned, it may well be associated with the practice, already referred to, of appointing a judge to be Deputy Chairman. As this is now mandatory for all four Commissions, by the 1958 Act, future reports of the Commissions will be of interest in this respect. Many tributes have been paid in the House to the Reports of the Commission for Scotland, mainly because detailed reasons for proposed constituency changes are given. The most notable tribute is that of a former Home Secretary—*House of Commons Debates*, Vol. 535, col. 1791.

³⁴ See below.

³⁵ Cmd. 7270 (December, 1947), p. 4, para. 10.

³⁶ Established by the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67). As already indicated, the local government areas tradition is probably not as strong as in England and this alleviates the problem there somewhat.

³⁷ The term is taken from the Initial Report of the Boundary Commission for Northern Ireland. Cmd. 7231 (September, 1947), p. 5, para. 13.

this may be at least as important as the coincidence of constituency boundaries with certain local government area boundaries, in Northern Ireland or elsewhere. The "local Parliament boundaries," for various reasons, do not always coincide with the relevant local government area boundaries in Northern Ireland and it is true that it probably would have been impossible even under the rules of the 1944 Act to achieve a coincidence of local government area boundaries, "local Parliament boundaries" and Imperial Parliament constituency boundaries, but what is certain is that the rules as modified by the 1947 Act precluded any such possibility and severely limited the discretion of the Boundary Commission for Northern Ireland to obtain the most reasonable compromise. The Commission said: "It is true that our proposed boundaries, in so far as they divide administrative counties, do not, in general, march with the local Parliamentary boundaries . . . It was not possible for us, however, to recommend new boundaries which would conform with the local Parliamentary boundaries unless we were prepared to make a wholesale departure from the rules laid down in the Third Schedule to the Act. . . . We did not, and do not, consider ourselves to be entitled to disregard the general requirement of Rule 5 (1) (c) of the Third Schedule [the local government boundaries rule]. . . . Had Parliament intended that the local Parliamentary boundaries should be taken into account by this Commission, we cannot but assume that it would have said so in unambiguous terms, at least when the matter was raised during the consideration of the 1947 Act."³⁸ Now this is a problem which confronts only the Commission for Northern Ireland, and there is obvious room for disagreement as to the importance of the local parliamentary boundaries in terms of determining Imperial Parliament constituencies, but it is unlikely that the other three Commissions will address themselves to this problem. If, as it appears, the views of the most influential of the Commissions, the Commission for England, are to be adopted, the Boundary Commissions are again jeopardising their most valuable attribute by making themselves vulnerable to criticisms based on national sentiment.

THE ELECTORAL QUOTA

Although the most significant feature of the 1944 Act was the creation of permanent machinery applying enacted rules for the determination

³⁸ *Ibid.* The restrained language supports the view that this Commission did not see its terms of reference as permitting a discussion on the merits of the rules or of offering criticism. The last part of the extract presumably refers to the Member for Antrim inquiring, during the Second Reading of the 1947 Bill, as to the effect of the modified rules on the relationship between the three types of boundaries in Northern Ireland. There appears to be no record of any explanation.

of constituencies *henceforth*, this was really a logical development of earlier practice in the distribution of seats. It is not a long step—although an important one—from the setting up of *ad hoc* Boundary Commissions with rules for redistribution embodied in their terms of reference and subsequently embracing their recommendations in a Redistribution Bill³⁹ to establishing permanent Commissions whose terms of reference, and the rules they have to apply, are in statutory form. But the expression of an arithmetical formula, the Electoral Quota, as one of the rules to be applied was perhaps the most interesting aspect of the Act. The notion of representation based on, or limited by, some numerical ratio enjoying fundamental authority is not uncommon in constitutional practice⁴⁰ and, although the legislative sovereignty of the Queen-in-Parliament in the British Constitution precludes any such *fundamental* limitation—apart possibly from the development of appropriate conventions—the 1944 Act did give statutory authority to an arithmetical formula, not as a rigid determinant in the form of a fixed upper or lower limit, but as a norm.

There is no doubt that population was one determinant in settling constituency boundaries even in the nineteenth century, but the existence of this determinant is to be found in the Official Reports, not in Acts of Parliament. Anson⁴¹ says of the Redistribution of Seats Act, 1885,⁴² that it “differed from its predecessors in that it departed to a great extent from the principle of local representation, and was professedly based on an attempt to divide the members, with a rough attempt at equality, among the population. . . . The Act, while . . . making some sacrifice of principle in favour of local representation, established as a basis of calculation the assignment of a member to every 54,000 of population.” Although this basis was employed in the redistribution brought about by the Act it is perhaps not quite accurate to assert that the Act “established this as a basis of calculation.” The population criterion is not expressed in the Act, the constituencies being specified and their limits described one by one in the Schedules to the Act, but it is expressed in *Hansard*: “As a rule, the ratio is one Member for 54,200 persons over the whole country.”⁴³ The distinction is important. The determination of a basis for a particular redistribution of seats is a very different

³⁹ As in relation to the Redistribution of Seats Act, 1885.

⁴⁰ e.g., “The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative. . . .” Art. 1, s. 2 (3), Constitution of the United States.

⁴¹ *Law and Custom of the Constitution*—Sir William R. Anson. Vol. 1 “Parliament.” Fifth ed. by M. L. Gwyer, p. 136.

⁴² 48 & 49 Vict. c. 23.

⁴³ Mr. Gladstone in moving leave to introduce the Bill. *House of Commons Debates*, Third Series, 1884–85, Vol. ccxciv, p. 374.

matter from the *enactment* of a numerical ratio to determine distribution *henceforth*.

As the Representation of the People Act, 1918,⁴⁴ which was the result of the first and most successful Speaker's Conference on Electoral Reform,⁴⁵ followed the pattern of the 1885 Act, thereby giving weight to a count of heads, it is overstating the case to suggest that the notion of the Electoral Quota was any break with tradition in this sense. Whether the force accorded to it in the rules constituted a break with tradition and, if so, whether this was an undesirable break, is another matter. But it is apparent that there seems to exist a deep-rooted objection to any strong expression of numerical equality between electorates,⁴⁶ and the force of the Electoral Quota rules has been modified by Act of Parliament and judicial interpretation and, finally, the concept has been fundamentally altered by the House of Commons (Redistribution of Seats) Act, 1958.⁴⁷ And in all this the Boundary Commission for England seems to have made the running.

The Electoral Quota⁴⁸ was intended as a norm as opposed to a rigid determinant. The rules provided for deviations from this norm, either way, up to the limit of one-quarter of the Quota and, in addition, the application of the Quota was subordinate to the rule determining overall United Kingdom representation and to the rule allowing consideration of geographical factors such as size and accessibility. The 1947 amendments—and the attitudes of the Commissions for England and for Wales have already been dealt with⁴⁹—eliminated the “25 per cent.” rule, and further diminished the force of the Electoral Quota by subordinating it to the “local government boundaries” rule. But the campaign did not end there and further modifications have been brought about by the adoption of a particular procedure by the Commission for England, a procedure upheld by a court of law and subsequently given statutory force by Parliament, and by recommendations of the same Commission which have also been given statutory authority.

In *Harper and Another v. Secretary of State for the Home Department*,⁵⁰ a challenge was made to a draft Order-in-Council which

⁴⁴ 7 & 8 Geo. 5, c. 64.

⁴⁵ Cd. 8463.

⁴⁶ The whole history of the Electoral Quota has been one of resistance to the notion of numerical equality of electorates. Indeed, in every debate on redistribution, from the 1885 Bill to the 1958 one, there has been a great emphasis, by Ministers and back-benchers, on the undesirability of hard mathematical rules.

⁴⁷ s. 3.

⁴⁸ Although it does not affect the issues being dealt with, it should be noted that the Electoral Quota, since it was introduced, has rested on electorate and not *directly* on population. It is interesting to note that the order of the present Electoral Quota is about the same as the average *population* of a constituency at the time of the 1885 Act, namely, 54,000. The electorate of such a constituency at that time would be 6,000–8,000.

⁴⁹ See above.

⁵⁰ [1955] Ch. 238.

had been laid before and approved by the House of Commons and which purported to give effect to one of the recommendations for constituency alterations made by the Boundary Commission for England in its First Periodical Report. The plaintiffs claimed a declaration that the Report of the Commission did not comply with the rules set out in the Second Schedule to the Act and was not, therefore, a report "under the Act" within section 5 (2) and, as a consequence, the Secretary of State was not bound by section 3 (4) to submit the draft Order-in-Council to Her Majesty. They asked for, and were granted, an interim *ex parte* injunction restraining the defendant until after a specified date from so submitting the draft Order-in-Council. However, the defendant was successful on appeal. The claim, which the court rejected, was that the Boundary Commission had wrongly calculated the Electoral Quota, obtaining a higher Electoral Quota than that demanded by the rules and, as a result of this wrong procedure, the two plaintiffs were to be transferred to a constituency with an electorate of 62,048, one from a constituency of 56,090 and the other from a constituency of 59,129, resulting in their votes being less effective⁵¹ and, in addition, their new constituency, instead of being identified with the City of Manchester, would have possibly conflicting interests between city and county.⁵² The basis of the claim was that Rule 7, which laid down the formula by which the Electoral Quota had to be calculated for purposes of Rule 5, defined the Electoral Quota as "a number obtained by dividing the electorate for *Great Britain* by the number of constituencies in *Great Britain* existing on the enumeration date." It was not disputed that the Boundary Commission had proceeded by the method of calculating a figure described as the "unit of electors" and that this norm had been obtained, not for Great Britain, but for *England*. The Commission, by looking first to Rule 1, which prescribes the number of seats for Great Britain as "not substantially greater or less than 613" and lays down a *minimum* of 71 seats and 35 seats for Scotland and Wales respectively, had deducted the actual Scottish and Welsh representation, 107 seats,⁵³ from the norm for Great Britain, thereby reaching the conclusion that the number of seats available for distribution in England had to be "not substantially greater or less than 506." The electorate of *England*, 28,904,108, was then divided by 506 and a figure of

⁵¹ Both constituencies already exceeded the Electoral Quota as defined by the Act (55,670), but only one of them exceeded the "unit of electors" (57,122) employed by the Commission. It remains true that this in itself may not have affected the issue.

⁵² A traditional problem still with us according to Parliamentary Debates.

⁵³ According to Rule 1, Wales must have "not less than 35" constituencies. In fact there are 36, which, combined with Scotland's 71, makes 107.

57,122 established. The Commission indicated this procedure in the Report and stated: "Our aim was to create 506 constituencies each of which would be at or near the electoral quota without cutting across local government boundaries."⁵⁴ The plaintiffs contended that all this was not in accordance with the Act and that the Electoral Quota which, according to the plain words of the Act, is to be found by dividing the electorate for *Great Britain* by the number of seats for Great Britain was 55,670, a figure somewhat lower than the "unit of electors" (57,122) that the Commission had employed. On this basis, it was argued, the Commission should have set the Electoral Quota alongside the electorate for England in order to determine the representation to which England was entitled. The English electorate divided by the Electoral Quota as defined in the Act gave a figure of 519, and this number of seats for England, instead of 506, should have been employed by the Commission. This would have increased the number of seats in Great Britain to 626, but Rule 1 permits a discretion in that it indicates "not substantially greater or less than 613," and it was argued that this increase was not substantially greater.

The court held that the Boundary Commission was under no obligation to proceed in this manner and that the method employed by the Commission met the terms of the Act. Evershed M.R. said: "... there is no ground for saying that this report, as I read it, was such a substantial departure, or was indeed any departure, from the rules which the commission had to have in mind."⁵⁵ He also indicated that the emphasis on Rule 1 was not misplaced, even allowing for the discretion permitted by that Rule.

Although it may well be that the procedure adopted by the Commission was not a substantial departure from the rules, it is difficult to agree that there was not some departure.⁵⁶ The fact that the Commission used as a yardstick the average electorate of England based on a predetermined number of seats for England, a concept not anywhere referred to in the Act, is not altered by the fact that

⁵⁴ p. 2, para. 9.

⁵⁵ p. 250. He also said: "The whole method was exposed on the face of the report, and, if the method they adopted was one which Parliament itself did not like, it no doubt would have modified or rejected it." See also *Hammersmith Borough Council v. Boundary Commission for England* (*The Times*, December 15, 1954). "... it did not seem to be for the courts to interfere ... even though the Commission had misunderstood their functions by misreading the rules and thereby vitiated their report" (*per* Harman J.).

⁵⁶ See also *Modern Law Review*, May, 1955, Vol. 18, No. 3, p. 281. Notes of Cases—"Boundaries between Parliament and the Courts," by S. A. de Smith. "With respect, it is difficult to accept the view that the Commission observed the rules laid down for it." This view has also been taken by many members of the House during the Second Reading and Committee Stage of the 1958 Bill as well as during the debate on the 1954 Reports—including the Home Secretary responsible for the 1947 Bill (Vol. 535, col. 1792).

the final results were within the discretion accorded in applying the Electoral Quota. The Report states: "Thus 410 constituencies or more than 80 per cent. of the whole fall within the range 45,000–65,000, of which the electoral quota [55,670] forms the mean."⁵⁷ And the court also used this argument. Nevertheless, it remains true that the norm defined by the Act was used only as an *ex post facto* criterion and advantage taken of a discretion given by the Act to imply the validity of the procedure.⁵⁸ This is suspiciously like the ends justifying the means.

Whatever the view taken of the procedure adopted by the Commission and the judicial attitude towards it, the sovereign legislature seems now to have put the matter beyond doubt. The House of Commons (Redistribution of Seats) Act, 1958, amends the principal Act of 1949 and, among other things, expresses a new rule for determining the Electoral Quota: "In the application of rule 5 . . . to a constituency in any of the several parts of the United Kingdom for which there is a Boundary Commission, the expression 'electoral quota' shall mean a number obtained by dividing the electorate for that part of the United Kingdom by the number of constituencies in it existing on the enumeration date (and not, as at present in Great Britain, a number obtained by reference to Great Britain as a whole)."⁵⁹ Thus there are now in fact *four* Electoral Quotas, each one of which is simply the average electorate for that particular country. In short, the "unit of electors" adopted by the Commission for England and of *Harper* case fame has now statutory force as the Electoral Quota and is mandatory for each of the Boundary Commissions.

There can be no doubt that the Boundary Commission for England played a substantial part in bringing about this change. Although in moving the Second Reading of the 1958 Bill the Home Secretary, in relation to two of the modifications proposed by the Bill, used the terms, ". . . as suggested by the Boundary Commission for England" and, ". . . the Boundary Commission for England reported that some relaxation of the rules might well be considered,"⁶⁰ no similar statement was made directly in relation to the proposal to alter the Electoral Quota formula, but there can be no doubt from the nature of the proceedings that the First Periodical Report of the

⁵⁷ p. 2, para. 10, of the Report.

⁵⁸ Not only that, but the Report never expressly states that the "unit of electors" is quite a different concept from the Electoral Quota and results in a different number. Indeed, the Electoral Quota, 55,670, is only shown once—and in brackets—when it is used to justify the constituency arrangements. Indeed some familiarity with the Rules is necessary to discern, in reading the Report, that a figure other than the Electoral Quota, as defined in the Act, is being used.

⁵⁹ s. 3.

⁶⁰ *House of Commons Debates*, Fifth Series, 1957–58, Vol. 582, cols. 228 and 230.

Boundary Commission for England and the circumstances of the *Harper* case were well to the forefront. Moreover, many Members of the House, including Ministers, seem to take the view that legislation in this field is now based, and rightly so, on recommendations of the Commissioners.

Thus it would appear that the Boundary Commission for England, just as it successfully advocated a change of rules to give greater weight to the factor of "local unity" and supported this canvassing by strong references to difficulties that had been created only by their own predilections, successfully achieved another modification to the rules by adopting a procedure which precipitated an issue described by some as a "constitutional crisis."⁶¹ And, as before, the change is mandatory for all four Boundary Commissions, the remainder of which have not advocated such a change and, indeed, one of them appears opposed, if not to such a view of the Electoral Quota, at least to its consequences for that particular country. In its Initial Report the Boundary Commission for Northern Ireland said: "It is, of course, not within the scope of our functions to consider the policy involved in the smaller Parliamentary representation of Northern Ireland, compared with Great Britain, as evidenced by the much higher Electoral Quota. But it is proper and necessary, in presenting this Report, to call attention to the effect of this discrimination—we use the word in its neutral sense—on the task which we are required to carry out."⁶²

Although the Boundary Commission for England appears to have

⁶¹ Some views expressed in the Press are quoted in the article in *Modern Law Review* previously referred to in note 56.

⁶² p. 5, para. 12. Northern Ireland, since 1944, has always had a separate Electoral Quota and its representation is rigidly determined at 12 members. The Northern Ireland Electoral Quota is 72,892; that is over 30 per cent. greater than the old Electoral Quota for Great Britain but over 51 per cent. greater than the Electoral Quota for Scotland as defined in the 1958 Act. It is true that Northern Ireland enjoys a limited measure of devolution, but it is equally true that Scotland, by the authority and prestige of the office of Secretary of State for Scotland, the existence of certain Scottish executive departments, a separate legal system and judiciary, and the unique position of the Scottish Grand Committee, also enjoys a limited kind of devolution. (See "Scottish Affairs in the House of Commons: a small experiment in devolution," by E. Fellowes in *Constitutional and Parliamentary Information*, 3rd series, No. 3, June, 1950.) Whether or not the existence of a separate representative assembly in Northern Ireland contrasted with this lack of self-expression on the part of Scotland justifies such a wide disparity in Electoral Quotas and is a sufficient cause of this varying treatment is a question in dispute, but the position of Wales with apparently no real authority over its own affairs, such as Scotland and Northern Ireland enjoy, and with an Electoral Quota higher than that for Scotland makes it difficult to reconcile all the positions.

The comments on Scottish representation must not be taken as an indication that the representation of a country, smaller in population than its neighbour, must not be "weighted" by reference to its separate identity and national aspirations, and equally must not be taken to imply any satisfaction with the nineteenth-century position, when an apparent parliamentary willingness to increase Scottish representation was so often negated by subsequent parliamentary unwillingness to increase the total representation.

been the only Commission enthusiastic about the substitution of the average electorate for each country for the Electoral Quota of Great Britain, the consequences of this change, coupled with the superior force of Rule 1 as exemplified in the *Harper* case, are likely to be detrimental to *English* representation. The overall figure for Great Britain representation is in the nature of a norm, "Not substantially greater or less than 613," while, for Scotland and Wales, rigid lower limits are expressed, "Not less than 71" and "Not less than 35" respectively. It is clear that any increase in Scottish or Welsh representation—and both Commissions have acknowledged their authority to recommend a greater number of constituencies⁶³—will tend to be at the expense of English representation. And if the Commission for England follows the precedent it created in its First Report of establishing English representation by deducting the number of seats recommended for Scotland and Wales by their respective Commissions from the overall normative figure for Great Britain, the tendency becomes an inevitability. Until the passing of the 1958 Act this, apart from the initial adjustments which were included in the recommendations for constituency changes in the 1954 Reports,⁶⁴ was more of a theoretical possibility than a practical probability and, in any case, there were limits to how far the process could develop. It is true that the element of discretion permitted in Rule 1 by expressing the Great Britain figure as a norm instead of a fixed determinant permits some balancing, and this was in fact done in the 1954 Report⁶⁵—and this compensatory device still exists—but two important limits to the diminution of English representation have been eliminated and it is unlikely that this discretion allowed by Rule 1 can compensate for those limits.

The first limit was to be found in the notion of an Electoral Quota for *Great Britain*. So long as this existed, and even if its function was only that of an *ex post facto* criterion, it must have limited, at some point, any persistent trend towards lower (or higher) representation for England in terms of the representation of other countries

⁶³ p. 4, para. 8, and p. 4, para. 9, of the respective Initial Reports. In fact, the Report for Wales recommended an additional seat.

⁶⁴ It is obvious that the introduction of permanent rules will lead to immediate, and perhaps substantial, constituency changes. These must be greater if, as in 1947, there has been no redistribution for nearly thirty years, and, of course, the factors created by the war exercised a great effect. It might well be the case that many of the problems were of a non-recurring nature and, after the initial adjustments had been made, only minor changes may have been necessary at the periodic reviews. If so, this has been at least partially lost by the changes in the Rules.

⁶⁵ This is illustrated by the 1954 Report for England in that, although resisting the implications of the argument advanced in the *Harper* case to increase English representation by 13 seats, it was increased by 5. If this had not been done the Commission would have had much greater difficulty in satisfying the Electoral Quota even as an *ex post facto* criterion. See above.

or of the United Kingdom. The size of the English electorate and the number of constituencies in England exercised only an *indirect* effect on the Electoral Quota for Great Britain, and a persistently increasing disparity between the average electorate for England and the Electoral Quota for Great Britain would have compelled, at some stage, however remote, an increasing force to the discretion accorded by Rule 1 to permit some variation of the 613 constituencies for Great Britain.

But even more important is the removal of a limit implied by the application of the new Electoral Quota to Scotland and Wales. There is no doubt that the Commissions for Scotland and Wales are entitled under the Act to recommend greater representation for these two countries and there is equally little doubt that by applying the new rules both Commissions, if they see fit, can advance a better case for such an increase in representation. Prior to the 1958 Act both countries had an average electorate considerably below the Electoral Quota for, in terms of the 1954 Reports, while the Electoral Quota was 55,670 the average electorate for Wales was 50,397 and that for Scotland was 48,011.⁶⁶ Consequently, to justify any increase in representation a very strong case would have been required,⁶⁷ not only because they enjoyed greater representation than England, but also because the Electoral Quota rules would have become more difficult to meet, even bearing in mind the incidence of Rule 6,⁶⁸ particularly in Scotland. For instance, at the last enumeration in Scotland, if the Electoral Quota for Great Britain, 55,670, is applied, only 11 out of the 71 constituencies exceed the quota, the largest constituency exceeding it by only 20 per cent., and one of the three very small constituencies being only 45 per cent. of the quota. But on the basis of an Electoral Quota for Scotland in terms of the 1958 Act, 48,011, there are 38 out of 71 constituencies above the norm, one of them to the extent of nearly 40 per cent. This is clearly a firmer basis for any recommendation to increase Scots representation than the former analysis based on an Electoral Quota for Great Britain.

The reason for this difficulty is to be found in the theoretical basis

⁶⁶ The average electorate for Scotland is given in the First Periodic Report for Scotland but the corresponding figure for Wales is not given in the Report for Wales. The figure used here has been calculated from the individual constituency electorate figures given in that Report, but the figure indicated in the House of Commons is 50,365 (presumably based on the 1953 electorate). In addition, the English Electoral Quota is higher than the one for Great Britain. As the population in England seems to be increasing more rapidly than that for the other countries the discrepancy will increase.

⁶⁷ For instance, the Commission for Wales, in recommending an increase from 35 to 36 seats, while acknowledging its authority to do this, admits its reluctance because the average electorate for Wales was substantially below the Electoral Quota for Great Britain. Initial Report of the Boundary Commission for Wales (December, 1947). Cmd. 7270, p. 4, para. 9.

⁶⁸ The "geographical considerations" Rule.

of the notion of an Electoral Quota for Great Britain as compared with the average electorate for one country. The Electoral Quota for Great Britain embraces a certain "quasi-extrinsic" factor that is *relatively* independent of changes in electorate and/or number of constituencies in any one of the countries concerned. Changes of either factor in any one country do not exercise the same *proportionate* change in a norm calculated by reference to figures for Great Britain as they do on norms based solely on figures for that country. But there is no such "quasi-extrinsic" factor in the Electoral Quota as defined in the 1958 Act and while the new norms may be satisfactorily employed to obtain the arithmetical equality of constituencies in terms of electorate *within each country*, this, in contradistinction to the norm now abolished, is the limit of its usefulness.⁶⁹ Although the consequences of this for English representation are of the utmost importance, the fact that the new norm is of a fundamentally different character from the old one is, in itself, not of tremendous import, but a failure to realise that the 1958 Act does not merely technically modify the concept of the Electoral Quota but substitutes something fundamentally different under the same name is of considerable import. Much has been said in Parliament disparaging the idea of constituencies drawn with any degree of mathematical precision in terms of electorate and yet, apart from possible consequences already dealt with, a highly sensitive, perhaps even unstable, norm has been introduced into the rules disguised as a technical modification.

The legislation compelling all four Commissions to adopt the "unit of electors" that the Commission for England adopted in the 1954 review is not the only alteration regarding the Electoral Quota which finds advocacy in the Report of the Commission for England and expression in the 1958 Act. In relation to the changes in the interval between reports considerable reference was made to paragraph 19 of the English Report. That paragraph referred to "two matters of considerable importance" the first of which was considered in relation to the alteration of the intervals between reports.⁷⁰ The Commission, in paragraph 20, expound their views on the second matter: "... but the terms of Rule 5 [Electoral Quota rule] left us no alternative to making provisional recommendations designed to bring electorates into closer conformity with the electoral quota. . . . In representations received by us there has been unanimity among all political parties in voicing objection, on grounds substantially similar to those referred to in paragraph 19, to our proposals designed to give effect to Rule 5. In a number of cases we have felt able to

⁶⁹ But see the Minister's argument in favour of separate Electoral Quotas—*House of Commons Debates*, Fifth Series, 1957–58, Vol. 582, col. 299.

⁷⁰ See above.

modify our original proposals and to recommend that no alteration should be made although on a strict view of Rule 5 some adjustment of boundary would be justified. It would ease the future labours of the Commission and remove much local irritation if Rule 5 were to be so amended as to allow us to make recommendations preserving the *status quo* in any area where such a course appeared to be desirable and not inconsistent with the broad intention of the Rules.”⁷¹ The Rules are so amended by the 1958 Act. The Commissions are charged to take account of the inconveniences attendant on alterations of constituencies, other than alterations brought about by Rule 4, the “local government boundaries” rule, and of any local ties which would be broken by such alterations.⁷² In the words of the Home Secretary, “. . . the effect . . . is to bring in a presumption against making changes unless there is a very strong case for them.”⁷³ But also in the words of the Home Secretary, “. . . and the Boundary Commission for England reported that some relaxation of the rules might well be considered.”⁷⁴ And the Electoral Quota is thus subordinated to a presumption that it should not be applied unless there is a strong case for applying it.

CONCLUSION

There would seem to be no doubt that the Boundary Commission for England, by action and advice, has been successful in securing alterations to the rules for the redistribution of seats, the rules which it is charged with applying for the purpose of impartial reviewing of parliamentary constituencies. In this way it has jeopardised the success of the whole structure by making it vulnerable if and when charges of manipulation for party advantage are levelled against a government, and by exposing it to allegations based on national feelings. By accepting a certain degree of responsibility for the rules its actual and apparent impartiality and independence become suspect.⁷⁵ If the Commissions enjoyed statutory authority to behave

⁷¹ p. 4, para. 20.

⁷² s. 2 (2).

⁷³ *House of Commons Debates*, Fifth Series, 1957–58, Vol. 582, col. 230. But the Attorney-General seems to prefer “slight presumption.” *Ibid.*, Vol. 585, col. 610.

⁷⁴ *Ibid.*, col. 230.

⁷⁵ The Home Secretary, in moving the Second Reading of the 1947 Bill, indicated that he had discussed certain problems with the Commissioners. This is rather different from the Commissioners criticising the rules in their Reports after they have applied them, particularly if the Commissioners for all four countries expressed their views. Although it cannot be refuted that the persons applying the rules are often in an excellent position to tender advice on the substance of the rules it remains true that any institution with an adjudicative function must build up a considerable tradition of fairness and impartiality before its views have great weight and, more important, before it can afford to appear at all responsible for the rules. Even with its great traditions the activities of the judiciary in this direction have limits. In any case, the insufficiencies of rules are often best exposed by giving detailed reasons for decisions.

in this way the problem would still be acute because the general argument against a body whose most important attribute is to be, and appear to be, impartial and independent would still apply. But the Commissions do not enjoy the appropriate statutory authority and, if they so act, they become more vulnerable. And the absence of statutory authority for this creates a problem in itself. If one or more of the Commissions refrains from discussion of the rules it is difficult to know whether the silence rests on satisfaction with the rules or respect for an Act of Parliament.⁷⁶ If it is the former then this ought to be taken into account when the wishes of one Commission regarding the rules are being given statutory force; if it is the latter then that Commission is being penalised for *not* exceeding its authority. This is dramatised by the Commissions being organised on the basis of one for each country, and it is not difficult to appreciate that such a matter can soon find expression in terms of the treatment accorded to the problems, requirements and ambitions of a particular country.

It seems clear that one fundamental problem ever since the rules were introduced has been the failure, before their introduction, to exhaustively examine the principles, and the relationships of these principles, underlying the rules, together with a reluctance to express principles which may have been politically inexpedient to express. Consequently the rules have contained inconsistencies and, in addition, some of the principles on which the rules were based only became clear to the electorate and interested bodies when they were applied in concrete cases. It may well have been this which has caused the Commission for England to advocate changes. But this can neither excuse such action nor render it the more desirable. The rules ought to be clear, consistent and honest, but it is questionable whether it is worth attaining this standard at the cost of the prestige of the machinery charged with applying the rules. In any case, it is highly unlikely that any one Commission, or indeed all the Commissions, with their existing constitutions and procedures are appropriate to improve the rules. The very fact that Commissions exist for each country, plus the incidence of differing conditions and problems in each country, and the very important feature that parliamentary representation at Westminster is a United Kingdom matter thereby implying some degree of compatibility of principles and rules throughout the United Kingdom, suggests that Commissions established for each country are singularly inappropriate bodies to advise on such rules.

The function of revising constituencies by applying the rules must be separated from the function of framing the rules, and it may be

⁷⁶ It has already been suggested that the latter is the proper view. See notes 19 and 33, above.

that yet another commission is necessary. However, some improvement might be effected by legislating for *all four existing commissions collectively, and in one report separate and distinct from their periodic Reports*, to make recommendations regarding the rules—and to adduce arguments in support of their proposals. This arrangement would have its difficulties and limitations but it would divorce the functions without ignoring the contribution to reform of the rules that those charged with applying them can often make. It might meet the problems arising from the differing conditions existing in the four different countries and so reduce any potential for discord based on national sentiment; it would emphasise the important fact that parliamentary representation is fundamentally in terms of the United Kingdom rather than in terms of the separate units; and it ought to eliminate the temptation to criticise the rules when recommending on their application in the Periodical Reports.

The separate Boundary Commissions should not have the authority to concern themselves with the merits of the rules and it goes without saying that they should not do so in the absence of authority. They should seek to implement their task of applying the enacted rules to the best of their ability and, to this end, rather than criticising the rules they are charged with applying, would do well to prefer the giving of detailed reasons for proposed boundary changes.⁷⁷ This is often a salutary discipline in that when reasons have to be given the apparent defects in the rules are often seen to be defects of logic on the part of the body interpreting and applying them, and, in any case, if there are shortcomings in the rules they will be the more apparent if reasons are given in support of decisions. Such a procedure might also help to modify or even eliminate some of the resentment felt about constituency changes. Unfortunately, the Commission for England has, on occasion, after applying a rule subjected it to severe criticism in the same Report.⁷⁸ Nothing could be more calculated to strengthen any resentment felt at a constituency change brought about by such a rule.

⁷⁷ This was urged by several members during the Committee stage of the 1958 Bill. The Secretary of State is compelled, by s. 3 (3) of the principal Act, to give reasons if the draft Order-in-Council laid before Parliament modifies the recommendation of the Commission, yet the Commission is not obliged to give reasons for the proposal to alter a constituency. A Home Secretary of an earlier period said that he did not know the reasons when he was Home Secretary: "As far as I know, the Home Secretary has no right to say to the Boundary Commissioners, 'This appears to be a curious constituency which you have arranged. As I have to defend your recommendation in the House of Commons, I should like to know why you reached this conclusion'." Vol. 585, col. 622. The Commission for Scotland has given detailed reasons for each change recommended, and it may be that the future practice of appointing judges as Deputy Chairmen will improve this matter.

⁷⁸ See, for instance, the latter part of para. 20 of the First Periodic Report of the Boundary Commission for England.

There can be little doubt that a continuation of present practice will jeopardise an institution that has much to commend it. Both the Press and Parliament have been hostile and, in the debate on the Second Reading of the 1958 Bill, a former Home Secretary, much associated with the work of the Commissions, said: "I am not convinced that the experiment has worked well. The difficulty of framing the rules so that they mean the same thing to the House as they do to the Boundary Commissions has been a perpetual trial. I had to make two or three efforts to get this going for the first review after the Second World War, and the difficulties that have been created make me wonder very much whether it is worth while trying to have a permanent Boundary Commission."⁷⁹

⁷⁹ *House of Commons Debates*, Fifth Series, 1957-58, Vol. 582, col. 259. This is an extremely pessimistic view and it would be unfortunate if an experiment having so great a potential were to be destroyed by the injudicious conduct of one Commission, even also admitting the inadequacies of the rules. It must be said, of course, that the difficulty of framing rules so that they mean the same to Parliament and to the bodies interpreting and applying them is not confined to the problem of Boundary Commissions.

UPPER CHAMBER SCRUTINY OF DELEGATED LEGISLATION

GREAT BRITAIN AND AUSTRALIA

JOHN E. KERSELL

THE large annual output of delegated legislation, its technicality and its usual lack of political import make the task of reviewing it odious and almost impractical for individual legislators in both upper and lower chambers. Wherever members of British Commonwealth Parliaments have been left to their own devices, it has in many instances been found that scrutiny of instruments of delegated legislative authority has been superficial and far from comprehensive. For these and other particular reasons scrutiny committees have been established in both British Houses of Parliament, in the Australian Senate and the Indian Lok Sabha. Much has been written about the House of Commons Select Committee on Statutory Instruments, and even the Indian scrutiny committee has been reported on in English journals from time to time.¹ While the House of Lords' Special Orders Committee and the Regulations and Ordinances Committee of the Australian Senate have not been completely ignored, they may merit greater attention than so far they have been given.

SPECIAL ORDERS COMMITTEE

In 1925, twenty years before the House of Commons, the House of Lords realised that Parliament's statutory control over subordinate legislation was not meant to be perfunctory. Lord Salisbury said: "When, therefore, I . . . observe that this [positive resolution procedure] is becoming little more than a formality, it is a great disappointment, and, I think, amounts to a mischief in our method of legislation." He went on, "if these positive Resolutions are not really a safeguard then we shall lose the value of that procedure."² His suggestion for remedy was an examining authority to see that the resolutions put before it dealt with matters which could safely be passed without the attention of the House, or, if necessary, bring matters of special significance to the notice of the House.

¹ See Sir Cecil Carr's "Parliamentary Control of Delegated Legislation," *Public Law*, Autumn, 1956.

² House of Lords Debates, vol. 57, cols. 648-649.

A select committee was appointed to consider the conditions under which the affirmative resolution procedure was provided, and to report on possible safeguards in the Lords' procedure in order that adequate parliamentary control could be preserved. In its report, submitted July 14, 1925, the Committee recommended that a standing committee should be appointed to which all regulations, orders, schemes, etc., requiring an affirmative resolution should be referred. As a result, a standing order (now S.O. 215 of Standing Orders of the House of Lords Relative to Private Bills, etc.) was adopted establishing the Special Orders Committee.

"Special Order" was defined as any order-in-council, departmental order, rule, regulation, scheme, or other instrument directed under any Act to be laid, or laid in draft, before the House of Lords and requiring an affirmative resolution. The Special Orders Committee was directed to consider four matters:

- (1) whether the provisions raise important questions of policy or principle;
- (2) how far the special order is founded on precedent;
- (3) whether the instrument can be passed by the House without special attention and whether there ought to be further special inquiry before the House proceeds to a decision, and if so, what form that inquiry might take;
- (4) where the Committee have any doubt as to whether or not an instrument is *intra vires* they must report to the House accordingly.

The last term of reference would, it is thought by Sir Cecil Carr,³ be more "impressive" if the Committee included some of the eminent judicial members of the House "as does the Lords Personal Bills Committee." One must agree that the views of laymen on questions of *vires* are bound to be inconclusive.

It seems that reporting as to whether a statutory instrument raises questions of policy or principle is useful, even though it might overlap the third term of reference. For, while a committee should not, perhaps, itself go into merit, there can be no objection to questions of policy and principle being drawn to the attention of a legislative chamber by one of its committees. Perhaps the House of Commons could take a leaf out of the Lords' Standing Orders in this regard. Subordinate legislation does not ordinarily deal with policy or principle, but whenever it does, the enabling legislature should be aware of the fact.

The question as to how far a statutory instrument is founded on precedent seems irrelevant. A thing is not necessarily right because

³ *Op. cit.*

it has been done before, and certainly the extent of precedent is no recommendation. Much that was done repeatedly in past centuries (and even a few years ago) is now considered politically intolerable.

When the Committee reports that no further inquiry is necessary, the affirmative resolution is usually passed without much debate. If special attention is sought by the Committee, it seems to be assumed that members of the House will interest themselves, or that the Minister moving the resolution will, at least, make use of the brief his Ministry compiled for him. "Further special inquiry" has come to mean inquiry by a select committee. This resort is seldom gone to. The aim of the machinery is, rather, to isolate for the peers things which deserve their attention and which they as individuals may wish to investigate and debate. Since 1925 the Committee has scrutinised and reported upon about 900 pieces of subordinate legislation.

This has been done by means of a fairly effective procedure. The Chairman of Committees in the House of Lords presides. The other twenty to thirty members of the Committee include leading members of the parties and peers some of whom invariably have had departmental experience. Before the meetings of the Committee, all instruments which are to be considered are examined by the Chairman and his Counsel. On many instruments draft reports are prepared for submission to the Committee. Each member is furnished in advance by the Department concerned with an explanatory memorandum. In the actual meeting, a representative of the Department, usually a senior official, explains the instrument and answers any questions put to him. If difficulties are expected to arise, or if questions of policy are at issue, the peer in charge of the instrument attends the meeting as a member of the Committee. The Minister never attends, though the departmental official may have with him a legal adviser. Any representatives of Departments withdraw while the Committee considers its report. The non-members are then called back by the Committee and informed of the proposed contents of the report. There is, it can be seen, a direct and useful contact between the Lords' Special Orders Committee and Whitehall.

Reports of the Committee are printed in full in the Proceedings of the House, thereby ensuring that all peers who have asked to receive the Minutes know the findings of the Committee before resolutions approving instruments are moved.

With regard to the effectiveness of the Lords' Special Orders Committee, it ought to be pointed out that it was first established at a time when most important subordinate legislation was intended by Parliament to be subject to affirmative resolution in each House prior to going into operation. This is the main reason why the Special

Orders Committee was confined in 1925 to the scrutiny of instruments requiring affirmative resolution. It is hard to understand, however, why the Committee is still confined to consideration of instruments requiring that procedure. Now that scrutiny and negative resolution are the most effective direct controls Parliament has over statutory instruments, one would expect the House of Lords to broaden the sweep of its scrutiny committee, and thereby increase its usefulness.

Reports of the Committee are invariably curt, answering only the questions raised by Standing Order 216 with little or no comment. As pointed out previously, however, even a report of this nature does isolate for peers the instruments which deserve their attention, and this is all that is desired. An interesting example of the effect of a Special Orders Committee Report is to be found in regard to the Town and Country Planning (Minerals) Regulations, 1954. The Report simply was that the Committee thought the Regulations did not raise questions of policy, were founded on precedent, but required the special attention of the House. Due to the rush of business prior to the Christmas adjournment, the affirmative resolution was moved just after 4.00 p.m. on the day the Report became available to the peers. Lord Silkin objected that in view of the Report, too little time was available for the consideration of the Regulations in question.⁴ As a result of this debate the Lord Chancellor assured the House "That in the future we will try to see that reasonable time is given to your Lordships for studying and considering regulations" brought to the attention of the House.⁵

From time to time, the Committee finds it necessary to make a more elaborate report than is usual. One such example is its Report on the Police Pensions Regulations, 1952, in which it was found that several proposed amendments to the principal regulations of 1949 omitted to state that it thought regulations should be made as clear as possible, and that whenever any amending regulation amends some passage that does not exist in the original regulations, a footnote should state precisely where the passage can be found. In the resultant debate,⁶ the noble Lord responsible for the regulations had, again, to assure the House that "we will do our best to see what can be done to improve the situation," and he was supported categorically by the Secretary of State for Commonwealth Relations.

All the foregoing being as it may, there is no doubt that the best Lords' Debates on affirmative resolutions are not necessarily provoked by particular comment from the Special Orders Committee, but by the

⁴ House of Lords Debates, vol. 190, cols. 479-480.

⁵ *Ibid.*, col. 483.

⁶ *Ibid.*, vol. 179, cols. 822-836.

mere fact of attention being brought to bear. This is particularly true with regard to regulations which raise important questions of policy and principle, and, of course, in such instances the Committee cannot go beyond indicating the situation.

COMMITTEE ON REGULATIONS AND ORDINANCES

Even before Lord Hewart's *The New Despotism* appeared in Australia the Senate there, on the motion of a private Senator, had appointed a Select Committee to report upon the advisability of establishing standing committees on: statutory rules and ordinances,⁷ international relations, finance, private Members' Bills and/or other subjects.

This Select Committee recommended the establishment of a standing committee system including a Committee on Regulations and Ordinances. It did so on grounds that the number, technicality and volume of regulations made it practically impossible for Senators to examine them in detail, and reported that a "very strong case had been made by various authorities appearing as witnesses before the Committee in favour of "some systematic check, in the interests of the public, on the power of making statutory rules and ordinances."⁸ One witness, amongst several of a similar opinion, argued that the Senate was the more appropriate body for exercising such a check. "The House of Representatives is not likely to do that work well or, in fact, to do it at all. Upon its vote turns the fate of the ministry. The regulation is made by the ministry, and a proposal for its disallowance would certainly be treated as a vote of want of confidence, and would be tested on party lines. No ministry depends on the vote of the Senate, and it is quite likely that in that chamber a regulation would be considered on its merits. It is a very dangerous thing that in Australia, as well as in England, so much of our legislation should be done by regulations for which Parliament does not take responsibility, and which are in a great degree inaccessible to the people. The scrutiny of those regulations would be a very useful function for the Senate to discharge, and one that could be better done by the Upper than by the Lower House."⁹ In its recommendations the Committee concurred, and even drew particular attention to this testimony.

By way of detailed recommendations the Select Committee in its first report of March 31, 1930, proposed that all Regulations and

⁷ Ordinances are the laws made for the Australian Territories, under delegated power, either by the Governor-General in Council or, as in the case of New Guinea, by a subordinate Legislative Council. Regulations may be made under ordinances and both types of instrument are usually subject to parliamentary control.

⁸ Australian Parliamentary Paper, S.1 of 1929-30-31, p. ix.

⁹ *Ibid.*, p. 23.

Ordinances laid on the Table of the Senate should be referred to the scrutiny committee for consideration and report. The Select Committee foresaw the work of the proposed Standing Committee as both preventive and corrective. It suggested that it be charged with the responsibility of seeing that enabling clauses would not confer legislative power which ought to be exercised by Parliament itself. Correctively, it would "scrutinise regulations to ascertain:

- (1) that they are in accord with the Statute;
- (2) that they do not trespass unduly on personal rights and liberties;
- (3) that they do not make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions;
- (4) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment."¹⁰

The Report went on to say that it would be conceivable that occasions might arise when the Committee should direct Parliament's attention to the merits of particular regulations, but it expressed the opinion that "the Standing Committee would lose prestige if it set itself up as a critic of governmental policy or departmental practice."¹¹

In moving the adoption of the report from the Select Committee on the standing committee system, Senator Colebatch argued that "Unless some action is taken we shall find that, with the increase of public business [the] tendency to legislate by regulation will become a growing evil." He referred to "the tendency of the official mind always to do things by regulation, if that can possibly be done, and so avoid the trouble of having an Act passed by Parliament," and suggests that "It would be a wise step if we took such measures as we could to prevent the further development of that [tendency]."¹²

The motion for the adoption of the Select Committee's report was not, however, passed by the Senate, principally because recommendations regarding appointment of the Standing Committee seemed impractical at the time. The report was, therefore, recommitted, and the Select Committee revised its recommendations regarding a scrutiny committee. The Second Report was adopted by the Senate, and the Standing Orders were amended to give effect to the recommendations contained in it. Although there were minor alterations made in the wording of the relevant Standing Order,¹³ there is only

¹⁰ *Ibid.*, pp. x-xi.

¹¹ *Ibid.*, p. xi.

¹² Australian Parliamentary Debates, vol. 123, p. 1313.

¹³ Australian Senate, *Standing Orders*, Canberra, Commonwealth Government Printer, 1937, S.O. 36A.

one important difference between it and what the Select Committee finally recommended. As the Standing Order was accepted it provides that "All Regulations and Ordinances laid on the Table of the Senate shall *stand referred* to such Committee for consideration and, if necessary, report thereon."¹⁴ Thus the Committee is competent to keep under review regulations which it considers in operation to present a changed aspect insofar as earlier consideration may have disclosed. Indeed in its eighth report, presented on May 29, 1952, the Committee asserted this competence as a duty.¹⁵

The four terms of reference under which the first Report of the Select Committee suggested instruments might be scrutinised were never formally adopted by the Senate. Senator Colebatch, however, speaking to the motion for the adoption of the Regulations Committee's first report, told the Senate that they had been accepted by the Committee as the principles upon which it was guided. In its fourth report, presented June 22, 1938, the Committee confirmed that these four principles had been observed by the Committee in its consideration of regulations. It was also reported in 1938 that, though many regulations had come before the Committee which, while quite correct in form, gave effect to some item of Government policy of a controversial nature, after careful consideration the Committee agreed that questions involving Government policy in regulations and ordinances fell outside the scope of the Committee.

Although the Regulations and Ordinances Committee excludes considerations of the Government policies which are sought to be achieved by subordinate legislation, it does not hesitate to report to the Senate, under its fourth term of reference, any matter of major Government policy not previously approved by Parliament but sought to be implemented, nevertheless, by regulation, or even by ministerial determination authorised by a regulation. Thus the Australian Committee does under its fourth term of reference what the British House of Lords Committee is authorised to do under its first, namely, draw attention of the legislature to instruments which raise questions of policy and principle, and it does so without itself considering policy matters.¹⁶

The Standing Committee on Regulations and Ordinances has formulated a particular procedure for considering regulations and ordinances.¹⁷ This consists of obtaining from the Government

¹⁴ *Ibid.* (Italics added.)

¹⁵ Australian Parliamentary Paper, S.1 of 1951-52-53, p. 3.

¹⁶ See especially the Committee's eighth and eleventh reports, Australian Parliamentary Papers, S.1 of 1951-52-53, and S.1 of 1957-58.

¹⁷ In actual practice the Committee has devoted very little time to ordinances, which are usually only challenged in Parliament, if at all, on the policy to which they give effect.

Department responsible for the issue of an instrument, first, a full explanation of it and its effect, and, secondly, the reasons for making it. Ever since the appointment of a legal adviser at the beginning of 1945, furthermore, the Committee has had prepared by him a separate report on each regulation and ordinance. These documents are considered in conjunction with the texts of the relevant instruments in a non-partisan atmosphere at meetings held regularly whenever the Senate is in session. Not only does the Committee enjoy legal advice from outside, but many of its chairmen, always members of the Government party, have been lawyers and there are, ordinarily, one or two other of its members from the legal profession. The Committee has also been well served by its secretaries, in particular Mr. J. R. Odgers and Mr. R. E. Bullock of whom it has been said: "the enthusiasm that has been engendered by this committee is largely attributable to the efforts of these two officers."¹⁸

Though the Committee has the power "to send for persons," unlike the British House of Lords it apparently rarely does so, relying more heavily on "papers and records." This is undoubtedly due to the Australian Committee's heavier work load. Since its establishment twenty-seven years ago the Committee has scrutinised over 4,000 regulations plus about 800 ordinances as compared to the 900 or so special orders reviewed by the Lords' Committee over a period of thirty-four years. This does not mean that the Senate Committee hesitates to call for oral evidence when it considers that the need exists. It published with its tenth report minutes of evidence heard at length from three witnesses.

The Australian Committee has power "to sit during Recess" of Parliament. This is potentially important. If the Australian Parliament were to require laying prior to the operation of regulations, the Senate Regulations Committee would be able to overcome at least part of the difficulty whereby bad regulations may operate with impunity while Parliament is recessed. As we shall see, the Regulations Committee has had some of its more important successes even before it has reported, and almost invariably before the Senate or House could act on the basis of its reports.

The Regulations and Ordinances Committee has submitted only thirteen reports in all the years of its existence. Although other reports have not been without significance and beneficial consequences, particularly in procedural and technical matters, the eighth report, which was presented to the Senate on June 3, 1952, began a series of four very significant and surprisingly effective reports. This initial report of the series commenced with a general review of the functions

¹⁸ Australian Senate Debates, September 4, 1956, p. 73.

of the Committee which emphasised, as we noted earlier, that regulations *stand* referred to the Committee. After briefly reviewing developments in regard to two particular sets of regulations, the report then launched into a closely reasoned argument criticising the Government's sub-legislative practices. The case in point was a ministerial determination made under a regulation which had evenly divided the Australian High Court as to whether it was valid. The subject was import restrictions of a broad and general nature, but the Committee early made it clear that it was not bringing into question the Government's policy. Its intention was to criticise the method of implementation, and it did so in most effective terms. The main burden of the argument was that important matters of Government policy ought to be implemented by Act of Parliament and certainly not by ministerial determination, which affords Parliament no opportunity whatsoever to deal with the Government's policy. As a result of this pungent report, which, incidently, is the only report of the Committee never debated by the Senate, the Government, on November 19, 1952, secured the passage through Parliament of an amendment to the Customs Act which accomplished in better keeping with parliamentary tradition what it had first tried to achieve simply by ministerial determination.

The Committee's ninth report, dated October 21, 1954, informed the Senate of correspondence, undertaken by the Committee between itself and the Minister of Health, in regard to eight regulations issued by his Department which dealt with substantive matters more appropriately the subject of parliamentary enactment. In each instance, the Committee reported, the Minister was in general agreement with the principle put forward by the Committee, and even before the Committee presented its report, he had secured the enactment of a new National Health Act which incorporated the offending regulations into statutory form.

One of the shortest reports ever submitted by the Regulations and Ordinances Committee was the tenth. It dealt with only one regulation, Statutory Rule No. 92 of 1955, which would have been Air Force Regulation No. 515 except for the competence of the Committee to submit this brief report and to publish therewith the minutes of evidence. This regulation provided that, if the Commonwealth suffered loss, damage or expense, and the Air Board, or a delegated officer, attributed this to a fault on the part of a member of the Royal Australian Air Force, that member should be liable to pay to the Commonwealth the amount of loss as determined by the Air Board, or its delegate. Decisions by a delegated officer were reviewable up to the Air Board but no further. The explanatory statement circulated by the Department of Air simply stated the

purpose of the regulation—to authorise the Air Board to recover losses of public money occasioned by neglect or misconduct of members of the R.A.A.F.—and indicated that the Air Board's authority could be delegated. On considering the instrument, relevant documents and evidence heard from the Assistant Secretary to the Department of Air, the First Assistant Secretary to the Treasury and the Parliamentary Draftsman the Committee concluded that:

- (1) The regulation was not authorised by the Act.
- (2) The regulation included provisions altering the law which, if appropriate at all, were appropriate only to enactment by Parliament. These were provisions for deductions from a member's pay:
 - (a) not only for direct losses to the Commonwealth, but also for losses through third party claims,
 - (b) of unlimited amounts,
 - (c) without appeal,
 - (d) without any procedure such as court-martial or civil court action, and
 - (e) without protecting any portion of the member's periodical pay.

These provisions were made notwithstanding the fact that section 3 (3) of the Air Force Act, 1923–52, specifically provided that section 58 of the Defence Act, which makes it mandatory that losses be recovered only through court action, should continue to apply to the Air Force.

As soon as all this was clear to the Committee, and while the regulation in question was still on the table of the Senate, the Chairman, Senator Ian Wood, gave notice of motion for the disallowance of the regulation. That motion, however, was not proceeded with, for the results of the Committee's investigations had, the previous week, reached the Government, and it very properly cancelled the regulation before a storm in Parliament could break.

That a storm would have broken, at least in the Senate, is fairly clear from the debate on the motion to have this tenth report printed.¹⁹ Almost a dozen Senators, in a chamber of only sixty members, took part in that debate, which was held three months after the Government withdrew the regulation. There were references even then to disturbing facts which had been brought out in the minutes of evidence, such as the disregard by Departments of advice tendered by the Parliamentary Draftsman as to the legality of their regulations. There were also many references to the utility and

¹⁹ Australian Senate Debates, vol. S.9, pp. 59–74.

effectiveness of the Committee. Speaking to that motion, furthermore, the Attorney-General stated that the regulation had been withdrawn by the Government as a matter of policy, and without particular regard to its legality or *vires*, when attention was drawn to its full effect. He went on: "That emphasises the importance of the Regulations and Ordinances Committee, because it is quite a simple matter for a regulation which, on its face, appears innocuous to be devastatingly dangerous. Perhaps, if Ministers themselves exercised greater vigilance in the scheme of things, that would not happen. However, the committee has more than justified its existence by bringing to the notice of the Senate the implications of regulations. . . ." ²⁰ The Australian Government on this occasion had clearly seen (without a parliamentary debate) and publicly admitted that its conscientious civil servants can, if left unchecked, seriously compromise basic elements in the democratic complex.

The Committee's eleventh report, completed May 2, 1957, again dealt with only one regulation, Statutory Rule No. 93 of 1956, which effected changes in import licensing regulations. These changes were deemed necessary following the revision of the Customs Act which has resulted from the Committee's eighth report. At least this was the explanation given to the Committee in the Department's accompanying note. The only material change, the note explained in a disarming way, was that an import licence could be issued subject to a requirement to be fulfilled after importation of goods as authorised by the parent Act.

The other changes effected by the regulations were not, in fact, substantive, but the provisions for licensing had far more to them than the explanatory note would lead one to believe. It prohibited the importation of *all* goods into Australia without a licence. The licence itself could be made subject to completely arbitrary conditions which the Minister, or his delegate, could vary at will, and which could be applied after importation as well as before. A licensing officer could require security in such sum as he considered sufficient for compliance with the Customs Act and the conditions of the licence. The Minister, furthermore, could revoke any licence at will, and that action, or any other he might take under the regulations, was final. There was no provision whatever for review or appeal of the Minister's arbitrary decisions—indeed, this possibility was explicitly excluded from the jurisdiction of the courts.

The Committee reported that it was quite clear that these regulations were "of such fundamental character as to be inappropriate to enactment by Cabinet or an individual Minister."

²⁰ *Ibid.*, p. 74.

And "further, it is transparently plain that the regulations deny every individual in the Australian import trade any right of access to the courts to adjudicate . . . complaints . . . [of] discrimination . . . unjust treatment or delays—all of which can ruin a man's business. . . . No reflection is made upon the integrity of the Minister. But 'amid the cross-currents and shifting sands of public life, the *Law* (not the Minister's opinion) is like a rock upon which a man may set his feet and be safe.'²¹ Not a majority imputes to the Department want of good faith. But 'good faith is not in my view sufficient by itself; some of the most honest people are the most unreasonable; and some excesses may be sincerely believed in, quite beyond the limits of reasonableness.'²² Denning L.J. has put it quite cogently.²³ 'An official who is the possessor of power often does not realise when he is abusing it. Its influence is so insidious that he may believe he is acting for the public good, when, in truth all he is doing is to assert his own brief authority. The Jack in office never realises he is being a little tyrant'."²⁴

The Committee in its report then went on to make an unprecedented recommendation in terms of unprecedented strength:

"In this Committee's opinion, the Senate ought not to permit a law of such a character to be made by the Executive. The result would be, if not a 'new despotism'—yet a despotism not made any better because we have become somewhat cynical of it. This Committee therefore is bound to report to the Senate its opinion that the regulation ought to be disallowed."

The report and recommendation were dated May 2, 1957. Almost immediately Senator Wood, Chairman of the Committee, must have put down a notice of motion for the disallowance of the regulations, for it appeared on the Order Paper for May 22, 1957. On the twenty-first, the day before the motion was to be debated, Senator O'Sullivan, the Attorney-General and Leader of the Government in the Senate, called a special meeting of the Minister for Trade, the Solicitor-General and the members of the Committee. During a day of hard bargaining Senator Wood proposed that an appeals board be established to hear appeals by importers against decisions of the Department of Trade on import licensing. Throughout the day members of the Committee insisted that such a board be established by legislation rather than by regulation, but at a "near-midnight

²¹ Sankey L.C., Speech at Mansion House, London, England, July 5, 1924.

²² Scrutton L.J., *R. v. Roberts* [1924] 2 K.B. 695, at 719.

²³ Denning, Sir Alfred, *Freedom Under the Law*, London, Stevens & Sons, Ltd., 1949, p. 100.

²⁴ Australian Parliament Paper, S.1 of 1957-58.

conference”²⁵ a compromise was reached whereby the Committee was given Licensing Advisory Review Boards in each state to hear appeals of importers refused licences by the Department of Trade, and the Government could, by the terms of the compromise, establish the system by regulation. This compromise satisfied the Committee, at least as far as its second and third principles of reference were concerned, and it was these, apparently, that members of the Committee concentrated on in their discussions with the Attorney-General, the Minister for Trade and the Solicitor-General. The regulations were not reported under the Committee’s first principle, for it was admitted they were in accordance with the statute, but because of their substantive nature, the Committee thought they should have been made by Parliament. The Customs Act of 1952, however, did bestow exceedingly wide powers upon the executive. This prompted Senator Wood to caution the Senate about “the necessity for extreme vigilance . . . when considering legislation.”²⁶

There were several reasons why the Government called members of the Committee to a special meeting and then agreed to a substantial part of their Chairman’s proposals. First, it undoubtedly saw the possibility of a defeat in the Senate on the motion to disallow the regulations.²⁷ Secondly, there was apparently fairly “widespread feeling of dissatisfaction in the business community about the way in which the regulations had been operating” since they went into effect on December 14, 1956.²⁸ Thirdly, however, was the courage and pertinacity of Senator Wood and his Committee. It should be emphasised here that Senator Wood and a majority of the Committee were members of the Government party. Yet the motion to disallow stood in Senator Wood’s name, and it was he who led the Committee in its negotiations with the Government. It was only after the Minister for Trade assured a concession of some significance that it was agreed to withdraw the motion. As *The Canberra Times* dramatically pointed out, the Committee, led by a Chairman inspired by the spirit of Parliament uncompromised by the inevitable pressures of partisanship, literally “carried the banner of Parliament into the strong-hold of the Executive.”²⁹

There is no way of accurately evaluating the total effect of the Senate’s Standing Committee on Regulations and Ordinances. It is interesting to note that, with the exception of import licensing, the

²⁵ *The Canberra Times*, May 22, 1957, p. 1.

²⁶ Australian Senate Debates, vol. S.10, p. 955.

²⁷ *The Canberra Times*, May 22, 1957, p. 1.

²⁸ Australian Senate Debates, vol. S.10, p. 957.

²⁹ *The Canberra Times*, editorial, May 22, 1957, p. 2. The motion to disallow the Customs (Import Licensing) Regulations was withdrawn, May 22, 1957, but Senator Wood, the Government Leader and the Leader of the Opposition made statements at the time. See Australian Senate Debates, vol. S.10, pp. 955–957.

Committee has never had to deal twice with the same sort of difficulty. It would, therefore, seem that departmental officials and their ministers are inclined to be more cautious once having had a regulation questioned by the Committee. It goes somewhat further than that. No Department, again with the exception of Customs and Excise, has offended a second time the principles adopted by the Committee as criteria for scrutiny. It will be interesting to see if there are any future customs regulations reported, for their makers have in fact been (1) mildly chastised in the fourth report, (2) obliged to amend their enabling statute consequent to the eighth report, and (3) forced to watch the Minister for Trade make substantial concessions as a result of their 1956 provisions regarding import licences. It may be that the strength of terms used in the eleventh report will have a humbling effect upon those with authority in Australia's Department of Customs and Excise. Even so they have already proved themselves more "courageous" than their colleagues in the other Departments, and as a result faced the devastating tempest of the Regulations and Ordinances Committee's eleventh report.

CONCLUSION

From what has been said, it would appear that an upper chamber scrutiny committee enjoys a number of significant advantages, which are likely to make it more effective than a lower chamber committee or a joint committee. Undoubtedly the most important of these advantages is that its actions and utterances do not threaten the stability of the Government. Thus the Committee can be left free to scrutinise instruments on broad terms of reference, initially, perhaps, of its own choosing, which do not exclude substantive matters. Its reports, even when highly critical of the substance of delegated legislation, are likely to be considered on their merits and not on party lines. The Australian Government has on at least four major occasions found it possible to meet the criticisms of the Senate Committee by making appropriate concessions rather than by "stonewalling" for a time before quietly implementing necessary changes.

A second chamber and its committees, in addition, are not as squeezed by clock or calendar as are a lower house and its committees. They are not as distracted by the urgencies of political and governmental problems. Their memberships include, in each of Britain and Australia at least, a generous proportion of able men some of whom have had executive and administrative experience. Particularly in Britain, but in Australia to a considerable degree, there is the valuable element of continuity which is often difficult to maintain in the complexion of lower house committees.

Given the advantages that an upper chamber scrutiny committee is likely to enjoy, it may not be unrealistic to advocate the improvement and strengthening of such committees where they exist and the establishment of them where they do not. On the basis of this study and a broader one made by the author,³⁰ it seems that a scrutiny committee should embody certain principles under which it can supervise not only the form of delegated legislation, but also its content. All instruments over which Parliament retains powers to affirm or annul ought to stand referred to it. Its terms of reference ought to include the power to report, at any time during the existence of a Parliament, instruments which:

1. raise questions of policy;
2. exclude challenge in the courts;
3. have retrospective effect;
4. are not clear in meaning;
5. were not published according to law;
6. were not laid according to law;
7. impose a charge, or commit Parliament to an expenditure.

An upper house committee, furthermore, could probably be trusted to consider whether instruments trespass unduly personal rights or liberties without parliamentary sanction. Finally, a scrutiny committee must be given adequate staff and specialist advice.

The value of the House of Lords' Special Orders Committee and of the Australian Senate's Regulations and Ordinances Committee has been generally affirmed by those in a position to appreciate their work and their effectiveness. That they might be improved is another question, but one that might be kept open. That other second chambers ought to consider establishing similar committees to scrutinise delegated legislation seems beyond reasonable question.

³⁰ Kersell, J.E., unpublished Ph.D. thesis, 1958 (London School of Economics and Political Science, University of London).

CURRENT SURVEY

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This digest, which has been compiled by the Editor, covers the period from October 1, 1958, to December 31, 1958.

UNITED KINGDOM

AGRICULTURE

The Agriculture Act, 1958 (Appointed Day) (Scotland) Order, 1958, has been made.

The Agriculture Act, 1958, provides that certain of its provisions shall come into operation on the appointed day. This Order fixes the appointed day, in relation to Scotland, as November 1, 1958, and has the effect of bringing into operation on that date all the provisions of the Act, other than those which came into force on August 1, 1958, the date on which the Act received the Royal Assent. (S.I. 1958 No. 1705.)

See also PUBLIC AUTHORITIES (below, p. 77).

COMPULSORY PURCHASE

Compensation

Regulations have been issued reducing from $6\frac{1}{2}$ per cent. to $5\frac{1}{2}$ per cent. per annum the rate of interest payable where entry is made, before payment of compensation, on land in Scotland which is being purchased compulsorily (S.I. 1958 No. 1802).

Regulations have been issued reducing from $6\frac{1}{2}$ per cent. to $5\frac{1}{2}$ per cent. per annum the rate of interest payable where entry is made, before payment of compensation, on land in England and Wales which is being purchased compulsorily (S.I. 1958 No. 1803).

Town and Country Planning Bill. The Ministry of Housing and Local Government has issued Circular No. 58/58, dated November 18, 1958, referring to the Town and Country Planning Bill which has received its second reading in the House of Commons. The Bill provides for the amendment of the basis of compensation for the compulsory purchase of land, the new basis to apply to the assessment of compensation under any notice to treat served after October 29, 1958. Where it is imperative for an authority to get possession of land urgently and they can buy by agreement at a price certified by the District Valuer to be in accordance with the provisions of the Bill, that price will be accepted for the purpose of loan sanction and of any Exchequer grant provided that there was no contract entered into before October 30, 1958.

See also LOCAL GOVERNMENT (below, p. 64); TOWN AND COUNTRY PLANNING (below, p. 79).

COURTS

High Court and Court of Appeal

Account of receipts and expenditure for 1957-58 has been published by the Lord Chancellor's Department.

Legal aid

Law Society of Scotland. The 8th Report of the Society, for 1957-58, on the legal aid scheme has been published (H.M.S.O. 49-373-8).

Legal Aid and Advice, Scotland. The Legal Aid (Scotland) (General) (No. 4) Regulations, 1958, have been made.

These Regulations amend the Legal Aid (Scotland) (General) Regulations, 1950 to 1954.

Regulation 2 enables a person resident outside Great Britain to have his application for legal aid sworn before any person for the time being authorised by law in the place where he is to administer an oath for any judicial or other legal purpose.

Regulation 3 empowers a legal aid committee to require a person who is paying a contribution to the Legal Aid Fund by instalments, and whose payments are two or more instalments in arrear, to pay the whole balance forthwith; and gives the Law Society the right to recover from him any sum not paid in pursuance of such requirement.

Regulation 4 makes provision for the payment, out of property recovered or preserved for a person in proceedings in respect of which he has received legal aid, of expenses due by that person to a solicitor (other than the legal aid solicitor) who acted for him in those proceedings before he began to receive legal aid or who delivered, for the purpose of the proceedings, documents over which he had a right of retention (S.I. 1958 No. 2199). (S. 117.)

CRIMINAL LAW**Statistics**

The statistics relating to crime and criminal proceedings in England and Wales, 1957, have been published (Cmnd. 529).

CROWN PROCEEDINGS**Privilege**

In deciding whether certain public documents should be withheld from production the Minister's sole concern is whether the interests of the State in the sphere for which he is the responsible official would be so affected that the Crown should withhold the documents from the parties and the court.

A. brought an action against B., a detective sergeant, and others, for false imprisonment, malicious prosecution and conspiracy. A. required B. to produce the police reports which he (B.) had made in the course of the criminal proceedings which were the subject of the present action. The Home Secretary, being of the opinion that the reports should be withheld from production on the ground of public interest, gave his certificate and swore affidavits in support. *Held*, that the Home Secretary's certificate was unimpeachable and, in the circumstances, conclusive even though fraud may have been established against the defendants: *AUTEN v. RAYNER* [1958] 1 W.L.R. 1300; [1958] 3 All E.R. 566, C.A. (applying *Duncan v. Cammell Laird & Co.* [1942] A.C. 624; explaining dictum of Jenkins L.J. in *Ellis v. Home Office* [1953] 2 Q.B. 135).

GOVERNMENT FUNCTIONS AND APPOINTMENTS**Ministers' Functions**

Education. The Ministry of Education has published two policy statements entitled: Secondary Education for All—A New Drive (Cmnd. 604); and Education in Scotland—The Next Step (Cmnd. 603).

The Ministry has published selected educational statistics relating to the educational year 1956-57 for local education authorities in England and Wales (H.M.S.O. 27-336).

Health. The Report has been published of the Ministry of Health for 1957, Part II, on the state of Public Health, being the annual report of the Chief Medical Officer (Cmnd. 559).

Post Office. The Report and Commercial Accounts for 1957-58 have been published (Cmnd. 621).

Transport. The Minister of Transport and Civil Aviation has presented his annual report on Roads in England and Wales for 1957-58 (H.C. 26 of 1958-59).

New Towns

Government proposals for the creation of a Central Commission to take over the assets of the development corporations for the new towns in England and Wales, as and when they became substantially complete, were discussed in the House of Commons on December 1, 1958, during the debate on the Second Reading of the New Towns Bill (596 H.C. Deb. 843-967).

Official facilities

Alleged misuse. On November 5, 1958, Mr. P. C. Gordon Walker M.P., in the course of debate in the House of Commons, alleged that official facilities had been made available to assist the circulation of a pamphlet issued by the Rented Homes Campaign and entitled "A Nation of Council Tenantry." The Prime Minister asked Sir Norman Brook, as head of the Civil Service, to investigate this allegation (594 H.C. Deb. 971-975, 1064-1068).

Sir Norman Brook concluded from the facts he found that no one in the public service had made any official facilities available with the conscious purpose of assisting the distribution of the pamphlet; that one member of the Council of the Campaign (Mr. H. Symon, a former Under-Secretary in the Ministry of Housing and Local Government) had asked the deputy to the Chief Information Officer at the Ministry (Mr. H. S. Winterbourne) if he could be supplied with a mailing list used by the Press Section of the Department; that this was sent, partly in the form of a set of pre-addressed economy labels; that Mr. Winterbourne, who did not know the special purpose for which this list was required, would have been wiser to refer to a higher authority in the Department before acceding to this request; that Mr. Symon was somewhat disingenuous in failing to disclose to Mr. Winterbourne this special purpose, and that he should have taken more scrupulous care to ensure that no improper use was made of the official labels; that general guidance should be given to Departments on the extent to which information in mailing lists could properly be made available to outside bodies (Cmnd. 583).

On November 12, 1958, the Prime Minister stated that Mr. Winterbourne had been formally reprimanded (595 H.C. Deb. 399-407).

Research

Colonial research. The reports for 1957-58 have been published of the Colonial Research Council and of other bodies concerned with agriculture, animal health, forestry, economics, fisheries, medicine, pesticides, products, roads, social science, tsetse fly and trypanosomiasis, anti-locusts and other matters (Cmnd. 591).

Department of Scientific and Industrial Research. The report has been published of the Fuel Research Board, with the report of its Director, for 1957 (H.M.S.O. 47-10-0-57).

Mental health. The Minister of Health published the list of research projects sponsored by the Medical Research Council in the sphere of mental health (595 H.C. Deb. 96-99, November 17, 1958).

National Research Development Corporation. The report and statement of accounts for 1957-58 have been published (H.C. 34 of 1958-59).

Scientific Policy

The annual report of the Advisory Council for 1957-58 has been published. It deals with the financing of scientific research in British universities, scientific manpower, scientific and technical literature, and overseas scientific relations (Cmnd. 597).

See also PARLIAMENT (below, p. 76).

Special Roads

HIGHWAYS

The Special Roads (Procedure) (Amendment) Regulations, 1958, have been made.

Under the Special Roads Act, 1949, the highway authority for a special road provided under the Act is required to publish in the prescribed manner a notice declaring the date on which the special road is open for use as a special road. These Regulations amend, as regards England and Wales, the Special Roads (Procedure) Regulations, 1950 (which, *inter alia*, prescribe the procedure to be followed in connection with the making of schemes and orders under the Act) by adding a new regulation prescribing the manner in which the said notice is to be published (S.I. 1958 No. 1848).

Transport

INQUIRIES

Air. The report has been published of the court investigation of the accident on October 23, 1957, to Viscount 802 G-AOJA which occurred at Nutts Corner Airport, Northern Ireland. The report is dated August 25, 1958 (C.A.P. 150).

Railway. The reports have been published (a) on the accident on April 27, 1958, near Whittlesea (August 27, 1958); (b) on the collision on May 20, 1958, at Arkleston Junction (September 3, 1958); (c) on the collision on March 8, 1958, at Chinley (August 1, 1958).

The annual report by Brigadier C. A. Langley, for 1957, on railway accidents in Great Britain has been published (H.M.S.O. 55-204-0-57).

Delegation

LOCAL GOVERNMENT

Health and welfare functions. Regulations have been made which prescribe the form of notice required to be published by a county council after submitting to the Minister of Health a scheme delegating health and welfare functions to the council of a county district, or a scheme varying or revoking such a delegation scheme. The regulations also prescribe the manner of publication of the notice (S.I. 1958 No. 2140).

Education

Agriculture. The report has been published of the Committee (Chairman: Earl de la Warr) on Further Education for Agriculture provided by Local Education Authorities (Cmnd. 614).

Finance

Borrowing. The rates of interest from the Local Loans Fund from October 25, 1958, are $5\frac{1}{2}$ per cent. for loans for not more than five years; $5\frac{3}{4}$ per cent. for five to fifteen years; $5\frac{5}{8}$ per cent. for fifteen to thirty years; $5\frac{7}{8}$ per cent. for more than thirty years (S.I. 1958 No. 1766 revoking S.I. 1958 No. 1412).

Grants. The General Grant Order, 1958, has been made. It prescribes for the years 1959-60 and 1960-61 (a) the aggregate amount of the general

grants payable under Part I of the Local Government Act, 1958, to the councils of counties and county boroughs in England and Wales and the Council of the Isles of Scilly; (b) matters which are to be, or may be, prescribed under Part III of the First Schedule to that Act, which determines the amount of the general grant payable to any such authority, subject to (c); and (c) that the amount last described shall be reduced by the product of a rate of ninepence in the pound (S.I. 1958 No. 2083). The report by the Minister on the Order has also been published (H.C. 15 of 1958-59) together with a Supplement (H.C. 15-1 of 1958-59). The Order was approved by the House of Commons on December 8, 1958 (597 H.C. Deb. 34-161).

The General Grant (Calculation) Regulations, 1958, for England and Wales have been made. They provide for estimates and conclusive calculations of the amounts of general grants payable to the councils of counties and county boroughs (S.I. 1958 No. 1939).

The Grants and Rates (Transitional Adjustments) Regulations, 1958, have been made. These regulations provide for the ascertainment of the losses and gains accruing to rating authorities from the coming into operation of provisions of Part I (Grants and Rates) of the Local Government Act, 1958, for the purposes of section 15 of the Act, which provides for transitional adjustments. *Inter alia*, the Regulations provide (paragraphs (2) and (3) of Regulation 7) for the assumption of the existence of a general grant order in 1957-58, but it is impossible, until the amounts of grants paid in respect of the year 1957-58 have been ascertained, to indicate definitively the figures which such order should have contained. These Regulations therefore prescribe (paragraph (2) of Regulation 7) figures to be assumed in the provisional estimates required by the Regulations: the definitive figures will be indicated in further Regulations (paragraph (3) of Regulation 7) (S.I. 1958 No. 2084). The regulations were approved by the House of Commons on December 8, 1958 (597 H.C. Deb. 34-161).

The General Grant (Scotland) Order, 1958, has been made. It prescribes for the years 1959-60 and 1960-61 the aggregate amount of the general grants payable under Part I of the Local Government and Miscellaneous Financial Provisions (Scotland) Act, 1958, to county and town councils in Scotland (S.I. 1958 No. 2128). The report by the Secretary of State on the Order has also been published (H.C. 16 of 1958-59). The Order was approved by the House of Commons on December 9, 1958 (597 H.C. Deb. 211-264).

The Transitional Adjustments Regulations for Scotland have been made. These regulations provide for the ascertainment of the losses and gains accruing to local authorities from the coming into operation of sections 1, 2, 4, 6 and 7 of the Local Government and Miscellaneous Financial Provisions (Scotland) Act, 1958, for the purposes of section 18 of the Act, which provides for transitional adjustments (S.I. 1958 No. 1925).

The Adjustments Regulations for Scotland have been made. These regulations provide for the ascertaining by the Secretary of State of the total expenditure incurred each year by certain local authorities on child care, education and training of health visitors and midwives; for the redistribution of such expense among all local authorities in the same proportions as the aggregate amount of the general grants is apportioned to them; and for giving effect to this redistribution by means of increases and decreases in the general grants payable to each authority (S.I. 1958 No. 1926).

Rating and valuation. The following decisions have been reported on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955: *North of England Zoological Society v. Chester R. D. C.* [1958] 1 W.L.R. 1258; *Working Men's Club and Institute Union, Ltd. v. Swansea Corporation* [1958] 1 W.L.R. 1135; *Independent Order of Oddfellows Manchester Unity Friendly Society v. Manchester Corporation* [1958] 1 W.L.R. 1171; *Butcher v. Cambridge City Council* (1958) 51 R. & I.T. 697; *Nottingham Mechanics Institution v. Nottingham City Council* (1958) 51 R. & I.T. 681.

Rules having been made prescribing the method by which alterations consequent on the partial re-rating of industrial and freight-transport hereditaments are to be made in the valuation lists made under the Local Government Act, 1948; they also prescribe requirements to be complied with as regards the entry of the notional electricity hereditaments introduced by section 12 of the Local Government Act, 1958 (S.I. 1958 No. 2039).

Statistics. The Local Government Financial Statistics, England and Wales, for 1956-57 have been published (H.M.S.O. 75-10-0-57).

Investment

Capital. The Ministry of Housing and Local Government published a circular on November 17, 1958, referring to a statement by the Chancellor of the Exchequer on November 3, 1958. This statement and circular encouraged local authorities to increase capital expenditure on water supplies, sewerage, housing and other services (Circular No. 60/58; 594 H.C. Deb. 641-643).

Members

Pecuniary interest. Section 76 (1) of the Local Government Act, 1933, provides: "If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority at which the contract or other matter is the subject of consideration, he shall . . . not . . . vote on any question with respect to, the contract or other matter." Bearing in mind the mischief of the Act, the words "or other matter" are not to be read in other than a very general way. The limitation in section 76 is not in regard to those words, but in the consideration of whether the person in question had a "direct" or pecuniary interest as opposed to a pecuniary interest which was too remote.

R. was the vice-chairman of a borough council housing and town planning committee. He was also the managing director of, and a shareholder in, a local building company. R. was present and voted at a committee meeting when tenders for building operations were under discussion. It was the policy of R.'s company not to submit tenders for work which would come up for discussion by the committee. R. was convicted of an offence under section 76 (1) of the Act of 1933 as being a member of the council with an indirect pecuniary interest in a matter under consideration. *Held*, that the company had a direct pecuniary interest in the matter and R., as its managing director, had an indirect interest and, accordingly, he was rightly convicted: *RANDS v. OLDROYD* [1958] 3 W.L.R. 583; [1958] 3 All E.R. 344, D.C.

On November 25, 1958, it was stated in the House of Commons that the Minister is to discuss the whole question of section 76 of the Local Government Act, 1933, with the Associations of Local Authorities (596 H.C. Deb. 26).

Police

Provincial police forces. On December 8, 1958, the House of Lords debated these forces (213 H.L. Deb. 4-55).

Regulations have been made amending the Police Regulations, 1952. Regulations 1 and 3 provide for increased scales of pay for inspectors, sergeants and constables. Special provision is made in Regulation 1 regarding the increments of sergeants who were promoted to that rank on or after April 23, 1955, and before April 22, 1958. Regulation 2 provides for increased rates of detective duty allowance. The Regulations take effect from April 22, 1958 (S.I. 1958 No. 1882).

Powers

Compulsory purchase. To satisfy the requirements of section 42 of the Housing Act, 1957, a local authority need not, before passing a resolution

declaring an area a clearance area, have specific figures before it, in order to be satisfied that the authority's financial resources were sufficient to carry the resolution into effect: *GODDARD v. MINISTER OF HOUSING AND LOCAL GOVERNMENT* [1958] 1 W.L.R. 1151; [1958] 3 All E.R. 482, D.C.

Reorganisation

Local Government Commissions for England and for Wales. The Local Government Commission Regulations, 1958, set out matters to which the Local Government Commissions established under Part II of the Local Government Act, 1958, are to have regard in the exercise of their functions, and make provision as to their procedure in certain matters (S.I. 1958 No. 2115).

These regulations were approved by Parliament on December 9 and 11, 1958 (597 H.C. Deb. 264-301; 213 H.L. Deb. 233-239).

On October 3, 1958, the Minister gave the names of the members of the Local Government Commission for England, *viz.*, Sir Henry Drummond Hancock (Chairman), Michael E. Rowe, Esq., Q.C. (Deputy-Chairman), The Hon. Ruth B. Buckley, J.P., B. D. Storey, Esq., E. W. Woodhead, Esq. The chairman and Miss Buckley will act in a part-time capacity. The warrant of appointment is for five years (594 H.C. Deb. 3).

On December 18, 1958, the Minister gave the names of the members of the Commission for Wales, *viz.*, Sir Guildhaume Myrddin-Evans (Chairman), Sir Emrys Evans (Deputy-Chairman), Professor C. E. Gittins, William Jones, Esq., and Mrs. Janet Morgan. All members are part-time. The warrant of appointment is for two years (597 H.C. Deb. 303).

Sealing of contracts

Law Reform Committee has issued its eighth report, on sealing of contracts made by bodies corporate. The question was referred to the Committee because of the decision in *Wright v. Romford Borough Council* [1957] 1 Q.B. 431. The Committee recommends that the provisions of section 32 of the Companies Act, 1948, which assimilates, so far as form is concerned, contracts entered into by a company to those made by a natural person, should be applied to other bodies corporate (Cmd. 622).

Water

The Ministry of Housing and Local Government has issued Circular No. 54/58, dated September 30, 1958, referring to the Water Act, 1958. The Act empowers the Minister to make orders enabling statutory water undertakers to obtain additional supplies of water for a limited period when they are faced with a serious deficiency in their supplies caused by lack of rain. In similar circumstances orders can also be made authorising them to supply from standpipes and water tanks. An Appendix to the Circular contains notes on the procedure for making applications for orders and on the Minister's handling of applications. Water undertakers are advised, if it is necessary to invoke the Act's powers, to do so with the utmost speed, and to submit the fullest possible information about their applications at an early stage.

See also *COMPULSORY PURCHASE* (above, p. 61); *HIGHWAYS* (above, p. 64); *PUBLIC HEALTH* (below, p. 78); *TOWN AND COUNTRY PLANNING* (below, p. 79).

MONOPOLIES AND RESTRICTIVE PRACTICES

Restrictive Practices Court

Decisions. Section 20 (3) of the Restrictive Trade Practices Act, 1956, provides that where any restrictions to which the Act applies are found by the court to be contrary to public interest the agreement shall be void. Section

21 (1) provides: "For the purpose of any proceedings before the court under the last foregoing section, a restriction . . . shall be deemed to be contrary to public interest unless the court is satisfied . . . (a) that the restriction is reasonably necessary, having regard to the character of the goods to which it applies, to protect the public against injury . . . ; (b) that the removal of the restriction would deny to the public as purchasers . . . substantial benefits. . . ." In deciding whether a restriction is "reasonably necessary" within section 21 (1) (a), the court must consider whether a reasonable and prudent man who is concerned to protect the public against injury would enforce this restriction if he could. He would not do so unless he was satisfied, first, that the restriction afforded an adequate protection and, secondly, that the risk of injury was sufficiently great to warrant it. It is well established as a general principle that the degree of care which a reasonable and prudent man should take depends on the magnitude of the risk.

In 1935, a federation of manufacturers, wholesalers and retailers of medical products, was formed the main object of which was that proprietary medicines should be sold to the public only by or through registered pharmacists. Of the 356 manufacturers, 122 were members of the federation. There was evidence that without the restriction some retail chemists might be forced out of business, but there was no evidence of any injury to the public by the sale of medicines through retailers other than chemists. *Held*, that the court was not satisfied that the restrictions were reasonably necessary or that their removal would deny the public substantial benefits; accordingly, the restrictions were contrary to public interest and void: *Re CHEMISTS' FEDERATION AGREEMENT* (No. 2) [1958] 1 W.L.R. 1192; [1958] 3 All E.R. 448; L.R. 1 R.P. 75, R.P.Ct.

Under section 20 (1) of the Restrictive Trade Practices Act, 1956, the court is empowered to declare whether or not any restrictions, as defined in the subsection and contained in the agreement to which the notice of reference applies, are contrary to the public interest. In order that such a declaration may be made in precise terms, the statement of case delivered by the respondent should identify precisely all the terms in the agreement which are admitted to be restrictions within the meaning of section 6 of the Act. The statement of case should set out in relation to each of the restrictions, taking them either separately or in a group as may be convenient, the particulars required under Rule 18. If the registrar wishes to contend that there are other restrictions contained in the agreement, and which are not identified in the statement of case, he should in his answer identify such other restrictions. If the respondent admits the restrictions alleged in the answer, he should in his reply give the same particulars in relation to them as are required for those set out in the statement of case.

Where pleadings which do not conform with this practice have already been filed, it will not be necessary to amend them; but the parties should identify in a separate document, to be filed with the proper officer of the court seven days before the earliest date for which the hearing of the case is fixed, the restrictions which they admit or allege: *PRACTICE DIRECTION (RESTRICTIVE PRACTICES COURT)* [1958] 1 W.L.R. 1213.

Direction. The Registrar of Restrictive Trade Practices has been empowered to exercise full responsibility for bringing cases to the Restrictive Practices Court. This was made public in an announcement by the Board of Trade on October 4, 1958, which stated that it had sent a direction to the registrar permitting him to take proceedings before the court in respect of any agreement not described in the schedules to earlier directions. Hitherto the registrar has been required to give priority to agreements concerning goods scheduled in those directions before starting proceedings in respect of any others in the register. The new direction does not affect agreements on which proceedings have been started, but the registrar may now start, at his own discretion, proceedings in relation to any other agreement on the register. The Board of Trade explained that the decision to send no more directions to the

registrar does not represent a change in policy on restrictive practices. It was envisaged under the Restrictive Trade Practices Act that the registrar would eventually exercise full responsibility for bringing cases to court.

Previous directions were given to the registrar by the Board of Trade in April and September, 1957, and in March and July, 1958. Between them they covered about 450 trade agreements (see also 592 H.C. Deb. 267-268, October 23, 1958).

NATIONAL HEALTH SERVICE

Regional Hospital Boards

Areas. The National Health Service (Determination of Regional Hospital Areas) Amendment Order, 1958, determines from April 1, 1959, the area of a new Regional Hospital Area, known as the Wessex Regional Hospital Area, for which a Regional Hospital Board is to be constituted for the purpose of exercising functions with respect to the administration of hospital and specialist services under the National Health Service Act, 1946.

The new area consists of the western portion of the South-West Metropolitan Regional Hospital Area which has accordingly been reduced in size from the same date (S.I. 1958 No. 2093).

Constitution. The National Health Service (Regional Hospital Boards, etc.) Amendment Regulations, 1958, amend the provisions concerning the appointment and term of office of members of regional hospital boards, hospital management committees and boards of governors of teaching hospitals (S.I. 1958, No. 1792).

The National Health Service (Constitution of Regional Boards) Order, 1958, continues in existence the fourteen regional hospital boards constituted under the National Health Service (Constitution of Regional Hospital Boards) Order, 1947. It also provides for the constitution of a regional hospital board for the new Wessex Regional Hospital Area (S.I. 1958 No. 2135).

NATIONAL INSURANCE

Decisions of the Commissioner and the Tribunal

Death grant. A widow failed to obtain payment of death grant within time and her right to payment was extinguished. Some time later the Claims and Payments Regulations were amended so that death grant was excluded from the extinguishment provisions. The claimant contended that the amendment operated retrospectively. *Held*, applying Interpretation Act, 1889, s. 38 (2), that the amending regulation did not have retrospective effect. It dealt, not with matters of procedure, but with substantive rights. There was no ground for inferring an intention to revive an expired right. The regulation was not ambiguous, but if it had been, the report of the National Insurance Advisory Committee and the Minister's Statement under section 77 of the National Insurance Act, 1946, could have been considered in order to resolve the ambiguity: Decision No. R(G) 3/58.

Misconduct. A claimant who was absent from work through illness and domestic circumstances, failed to explain his absences to his employer and was dismissed. *Held*, that an employee is expected to do all that he can reasonably do to notify his employer promptly of the reason for his absence and keep the employer informed if the absence continues. The claimant's loss of employment was therefore due to his misconduct: Decision No. R(U) 23/58.

"Normal course." A man claimed benefit for a Saturday when his services were not required by his employer. He was employed under an agreement which had just been changed so that the working week was increased from 5 to 5½ days. The claimant had worked on only 9 Saturdays in the past 12 months and following the change in the working week he worked on 6 out

of a possible 14 Saturdays. *Held*, that Saturday was a day on which in the normal course the claimant would not have worked. The proper test was to determine, having regard to the record of work in the past, what the claimant, in the normal course, had done and not what work any agreement might provide: Decision No. R(U) 22/58.

Share fisherman. A share fisherman claimed benefit while his boat which was damaged was undergoing repairs. While they were repairing the boat the boat builders did not allow any person other than their own craftsmen to touch it. Moreover, there was no work on it which the crew might have been expected to do. *Held*, that the claimant had proved that there was no work on or in connection with the vessel available to him. Distinction drawn between this case and that in Decision R(U) 15/52: Decision No. R(U) 21/58.

Widow's benefit. A widow suffered from fibrositis and could not do work which involved standing. Her earnings less fares were £3 8s. 0d. a week. She was able to do some housework but had to employ a woman for other housework. *Held*, that she was incapable of self-support. Until further notice £3 3s. 0d. should be taken for the purposes of claims for benefit as the minimum needed for self-support. The claimant's need to employ someone for housework reduced her net earnings below this figure: Decision No. R(G) 2/58.

Retirement pensions

The Government's plan for a revised national pension scheme was published on October 14, 1958. The Government proposes to introduce legislation during the 1958-59 parliamentary session, but it would not be possible to implement any new legislation before April, 1961.

Like the Labour Party's plan the Government plan proposes a scheme of graduated contributions and pensions related to earnings, but it differs from the Labour plan in several respects. The Exchequer would support the new scheme by a fixed yearly payment of £170 million (instead of about £125 million as at present): the Labour plan had proposed an Exchequer payment of 2 per cent. of total earnings. The lowest-paid workers would pay slightly lower contributions than at present, but receive no increase of pension: the Labour plan had envisaged increases in both basic contribution and pension. The Government plan applies only to employed contributors and not to the self-employed: the Labour plan included the self-employed. In both plans, workers covered by approved private schemes need not pay the additional graduated contribution under the national scheme, but, in the Government plan, contracting out of the national scheme could be effected only on a group basis, and on the initiative of the employer concerned, not (as in the Labour plan) on the worker's individual decision. Occupational pension schemes have grown in recent years until they now cover nearly 9 million workers, or more than one-third of the total working population, including half of the men.

The main points of the Government's proposals are:

1. Employees over eighteen who are in the graduated scheme will pay, with their employers, a minimum joint contribution on all earnings up to £9 a week. This will include, in addition to National Insurance and Industrial Injuries Insurance, the present separate National Health Service contribution. The minimum joint contribution will be 15s. 4d. a week for men and 13s. 6d. a week for women, compared with the present contributions of 18s. 2d. and 14s. 9d. respectively. On earnings above £9 and up to £15 a week, there will be graduated contributions of 8½ per cent. of earnings, divided equally between employer and employee, running up to a maximum of 10s. 2d. a week for those earning £15 or more a week, in addition to the minimum contribution.

2. These contributions, besides qualifying for the present flat-rate National Insurance and Industrial Injuries benefits, will earn additional retirement pension on the following scale: each £15 of graduated contributions paid by an employed man, with the matching £15 paid by his employer, will add one shilling a week to his standard pension of £2 10s. if he is single and £4 if he is married. For a woman, who becomes entitled to her pension five years earlier, each shilling unit will correspond to £18 of graduated contributions paid by her with the matching contributions from her employer.
3. Occupational schemes will be approved for the purpose of contracting out if they are financially sound and if no employee can be entitled to less pension as a result of being contracted out than he would have been entitled to if he paid maximum contributions to the State scheme during that period. Members of contracted-out schemes and their employers will pay the present joint contribution of 18s. 2d. for a man and 14s. 9d. for a woman. These contributions will qualify them for the present flat-rate pensions and benefits.
4. The self-employed, the non-employed and juveniles (those under 18) will not pay graduated contributions or earn graduated pensions. They will pay contributions at the present rates and they will continue to be entitled to the present flat-rate pensions and benefits.
5. To meet the rapidly rising cost of retirement pensions—from an estimated £685 million in the first year of the new scheme to an estimated £1,053 million twenty years later—contributions will have to be increased at five-yearly intervals during the first twenty years. In the graduated scheme, each increase will range between 5d. a side for employee and employer on the minimum contribution and 9d. a side on the maximum contribution, and will not add to graduated pension. Comparable increases will also be made in the flat-rate contributions for the self-employed, the non-employed and those employees contracted out (Cmnd. 538; Commonwealth Survey, C.O.I., October 28, 1958; for debates, see 595 H.C. Deb. 197–326, November 11, 1958, and 212 H.L. Deb. 1073–1142, December 3, 1958).

Yugoslavia

Convention on social security between the Governments of the United Kingdom and the Federal People's Republic of Yugoslavia of May 24, 1958, has been published. Ratifications were exchanged on July 28, 1958 (Cmnd. 561).

NATIONAL INSURANCE (INDUSTRIAL INJURIES)

Decisions of the Commissioner and the Tribunal

False statements in claim. The claimant, for the purpose of obtaining injury benefit, stated that his employer paid him for travelling time and also allowed him petrol for his van. The Commissioner found these statements to be untrue. *Held*, that repayment of any benefit paid was required. The claimant, by making false statements, had not acted in good faith "as to the obtaining of benefit." It was immaterial that the statements, even if true, would not have benefited the claimant. A third false statement was not relevant to the consideration of good faith, because it was not made until after benefit had been paid: Decision No. R(I) 18/58.

"Out of and in the course of employment." A bus conductress remained in the rest room at the depot between two spells of duty. She was required by her employers to report for duty ten minutes before the bus was due to leave the depot. While going from the rest room to the office to collect

way bill and tickets shortly before her bus was due out she slipped down stairs and injured her back. *Held*, that the accident was an industrial accident. The claimant had re-entered the sphere of her employment when she was using the stairs to go to the office: Decision R(I) 11/54 distinguished: Decision No. R(I) 20/58.

An agricultural worker whilst taking shelter under a tall ash tree in the field where he had been working was struck by lightning and died instantly. *Held*, that the accident did arise out of the claimant's employment. It was incidental to his employment that he should seek the nearest convenient shelter. His employment therefore took him to a place which, in a thunderstorm, would be abnormally dangerous and involve a greater risk of being struck by lightning: R(I) 12/56 distinguished: Decision No. R(I) 23/58.

Procedure. Claimant suffered an accident on December 24, 1956, which was not allowed as an industrial accident. He appealed and at the hearing before the local tribunal he mentioned a previous accident which he claimed he had sustained on December 20, 1956. The tribunal adjourned. The insurance officer referred the question of the alleged accident on December 20, 1956, to the tribunal. At the resumed hearing both the appeal and the reference were treated as one case and only the decision relating to the accident on December 24, 1956, was recorded on form L.T.3 (Rev.). The findings of the tribunal relating to the alleged accident on December 20, 1956, were recorded on a separate piece of paper. The Commissioner indicated the procedure which a tribunal should follow when dealing with more than one accident, or alleged accident, to the same claimant. They should be treated as separate cases, numbered separately and heard consecutively. The evidence and decisions should be recorded separately: Decision No. R(I) 22/58.

Reasonable cause for delay in claiming. An iron moulder claimed and received sickness benefit when his doctor certified his incapacity as due to bronchitis, myocarditis or asthma. He later claimed disablement benefit for pneumoconiosis but a medical board decided he was not suffering from the disease. After his death, however, pneumoconiosis was revealed at post-mortem examination. A medical board then decided that he had been suffering from the disease. *Held*, that he had had reasonable cause for delay in claiming disablement benefit. It would have been unreasonable to have expected him to claim when his doctor was certifying him to be suffering from diseases other than pneumoconiosis: Decision No. R(I) 24/58.

Prescribed diseases

Debate. On October 29, 1958, the House of Commons debated the National Insurance (Industrial Injuries) (Prescribed Diseases) Amendment Regulations, 1958 (S.I. 1958 No. 1068) (594 H.C. Deb. 289-312).

NATIONALISED INDUSTRIES

General

Capital investment. On November 3, 1958, the Chancellor of the Exchequer announced a general increase of £125-£150m. in the rate of public investment in 1959-60 as compared with 1958-59. Some of this falls within the investment by nationalised industries (594 H.C. Deb. 641-642; see also 595 H.C. Deb. 560-561, November 13, 1958).

Federation of British Industries have published a report on Nationalisation (November, 1958).

Members. The list of members of public boards of a commercial character as at November 1, 1958, has been published, with salaries and allowances together with a list of those holding more than one appointment (Cmd. 609).

Parliamentary examination. The sessional Select Committee on Nationalised Industries has been appointed (594 H.C. Deb. 463, October 30, 1958).

Airways

Guarantees. The Treasury has issued statements of guarantees on loans proposed to be raised by the British European Airways Corporation (H.C. 311 of 1957-58) and British Overseas Airways Corporation (H.C. 312 of 1957-58).

Coal

Borrowing. The Coal Industry Nationalisation (Borrowing Powers) Order, 1958, has been made.

Section 26 of the Coal Industry Nationalisation Act, 1946 (as amended by the Coal Industry Acts, 1951 and 1956), provides, *inter alia*, that the Minister of Power may make advances to the National Coal Board to enable them to defray expenditure properly chargeable to capital account and that the aggregate amount outstanding by way of principal in respect of such advances made before August 2, 1961, shall not at any time in any financial year exceed by more than £75m., or such greater sum as the Minister of Power may by order specify for that year, the highest aggregate amount so outstanding at any time during the preceding financial year.

This Order specifies the sum of £130m. as the amount of the maximum permitted increase during the financial year which ends on March 31, 1959 (S.I. 1958 No. 2040).

This Order was approved by Parliament (596 H.C. Deb. 8-9, November 24, 1958; 596 H.C. Deb. 1190-1313, December 3, 1958).

Electricity

Borrowing. A memorandum has been published on the Electricity (Borrowing Powers) Bill (Cmnd. 618).

Consultative councils. The Electricity (Consultative Council) (South of Scotland District) Regulations, 1958, regulate the vacation of office of chairman, the deputy chairmanship, terms of membership and proceedings of the Consultative Council appointed under the Electricity Act, 1947, as amended by the Electricity Act, 1957, for the South of Scotland District. They contain an additional ground for the vacation of office of chairman (S.I. 1958 No. 1923).

The Electricity (Consultative Council) (North of Scotland District) Regulations, 1958, regulate the vacation of office of chairman, the deputy chairmanship, terms of membership and proceedings of the Consultative Council appointed under the Electricity Act, 1947, as amended by the Electricity Act, 1957, for the North of Scotland District. They contain an additional ground for the vacation of office of chairman (S.I. 1958 No. 1924).

Guarantees. The Treasury has issued statements of guarantees on loans proposed to be raised by the Electricity Council (H.C. 315 of 1957-58), the North of Scotland Hydro-Electric Board (H.C. 317 of 1957-58 and H.C. 28 of 1958-59) and the South of Scotland Electricity Board (H.C. 318 of 1957-58).

Inquiry. On July 28, 1958, it was announced that the Minister of Power had asked Mr. Henry Benson, C.B.E., F.C.A. to inquire into the methods adopted by the London Electricity Board for the disposal of scrap cable and into allegations which had been made regarding those matters (592 H.C. Deb. 90; for earlier history, see [1958] P.L. 88, 288, 400).

The report of this inquiry was published in December, 1958. The summary of the allegations and the findings of the report were:

1. Allegation that the method adopted by the London Electricity Board for disposing of scrap cable was unsatisfactory and that an alternative method should be adopted.

Findings: (i) In 1954 the Board was justified in adopting the method of disposing of scrap cable by annual contracts and in adhering to it thereafter. Subject to the reservation made in Finding No. (2) there is no justification for requiring the Board to adopt an alternative method in the future.

(ii) The Board should from time to time in future make an independent check of its contract prices by collecting scrap cable in lots of convenient size in at least one district; the lots should be sold by tender after inspection by the merchants or alternatively tenders should be invited from cable manufacturers and the scrap metal trade on the basis of a clearing and stripping charge. The net realisations should be compared with the sums realised under the Board's present method after taking into account any additional expense which a change of method would involve.

2. Allegation that, as a result of its method of disposal of scrap cable, the London Electricity Board was responsible for loss of public money and other serious deficiencies in administration.

Finding: The allegations of loss of substantial sums of public money and other serious deficiencies in administration are not justified.

3. Allegation that there were suspicions in the scrap metal trade that the adherence by the London Electricity Board to its method of disposing of scrap cable indicated that a person or persons in the Board had an ulterior or improper motive for doing so.

Findings: (i) In 1952 a member of the Board's purchasing staff under the Purchasing Officer purchased a car for his private use from a company of scrap metal merchants which was regularly submitting tenders to the Board. This transaction should not have taken place.

(ii) The foregoing transaction could not have had any influence or bearing upon the Board's decision to adopt the present tendering procedure in 1954 or to adhere to that system thereafter.

(iii) With the exception referred to in Finding No. (i), the suspicions of the scrap metal trade as regards the integrity of the Board's staff are unsupported by fact or evidence.

(iv) Although the receipt of gifts at Christmas time by the Board's purchasing staff is known to and approved by the Chairman and Deputy Chairman of the London Electricity Board, the Board should reconsider the matter with a view to bringing the practice to an end.

(v) There is no substance in any of the three specific complaints, details of which were furnished, that the Board conducts its business unfairly.

(vi) The system laid down by the Board for controlling scrap cable from the time it arises until it is delivered to the merchant is sound (Cmnd. 605).

Members. On November 3, 1958, the Paymaster-General stated that the Minister of Power desired to see a greater proportion of whole-time members on the electricity and gas boards (594 H.C. Deb. 594-595).

Reports. The reports and accounts for 1957 of the twelve electricity area boards and their consultative councils have been published together with those of the Central Electricity Authority and the report of the Minister of Power (H.C. 276-289 of 1957-58).

Superannuation. The Electricity (Superannuation Scheme) (Winding Up) (South of Scotland) Regulations, 1958, provide for the winding up of certain pension schemes listed in the schedule to the regulations, which provided superannuation benefits to the employees of the former electricity undertakings therein mentioned.

Assets and outstanding liabilities pass to the Committee appointed under the Superannuation Scheme of the South of Scotland Electricity Board.

Certain requirements are specified in the regulations for the effective registration of the title to the property being transferred. Provision is also made

for the auditing of the accounts of the scheme being wound up up to the date of the transfer.

Any surplus after discharge of the liabilities passing to the Committee of the Superannuation Scheme of the South of Scotland Electricity Board is to be applied for the purposes of the Scheme (S.I. 1958 No. 1922).

Gas

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the Gas Council (H.C. 316 of 1957-58).

Members. See **Electricity**, above.

Reports. The reports and accounts for 1957-58 of the twelve gas area boards and their consultative councils, have been published together with those of the Gas Council and the report of the Minister of Power (H.C. 290-303 of 1957-58).

Transport

Finance. On November 5, 1958, the Minister of Transport and Civil Aviation informed the House of Commons that the chairman of the British Transport Commission had reported to him that, as a result of a sharp and unexpected fall in bulk traffic carried on British Railways, due to conditions in the coal, steel and other basic industries, it was expected that, in 1958, there would be a deficit in the order of £85 million, or about £20 million more than the deficit in 1957. In the light of the chairman's report, which included an undertaking to secure further large reductions in working costs, and to increase revenue in order to meet the position, the Minister stated that the Government would be prepared to advance the necessary funds to the Transport Commission, under the Transport (Railway Finances) Act, 1957. It would also consider the Commission's future position in connection with the general question of the borrowing powers of the Commission, which are at present limited to £250 million. (If the 1958 deficit is about £85 million, the total borrowings in respect of the three years 1956 to 1958 will amount to £200 million.) The correspondence between the Minister and the chairman of the British Transport Commission has been published as a White Paper. The White Paper also contains a review of the railway modernisation programme, and the following is a summary of some of the points made.

The chairman of the British Transport Commission restated the Commission's conviction that, by modernisation and nationalisation, British Railways could be made to pay their way. The Commission's fifteen-year modernisation and re-equipment plan was published in 1955, and is expected to cost about £1,500 million. The stage in modernisation has now been reached when, although much planning has yet to be done, the new equipment in use is making a real impact on the pattern of services, and this is reflected in the resulting revenue. The most striking advance is in diesel traction, where over 1,000 main line and shunting locomotives are now in service; over 150 diesel main line locomotives will be in service by the end of 1958. There are also over 2,000 multiple unit diesel vehicles in use; these show substantial increases in receipts over 1957, such as 55 per cent. in Hampshire and 112 per cent. on Tees-side. Electrification schemes are well in hand, but progress is less spectacular because of the large amount of associated engineering work. It is significant, however, that the electrification of the Shenfield-Southend line has virtually doubled the traffic. The continuation of the modernisation programme at the present rate is an essential contribution towards making the railways pay, and providing the modern railway system which is essential to the industrial future of the United Kingdom (Cmd. 585; 594 H.C. Deb. 51-64, 99-100; 595 H.C. Deb. 33-35; Commonwealth Survey, C.O.I., November 25, 1958).

On November 12, 1958, the Minister stated that the limitations on capital investment on the railways which were imposed a year before had been

relieved when an extra £25m. was made available in May and that consideration was being given to the possibility of a further acceleration in 1959 (595 H.C. Deb. 376-378, 379-381; see also 594 H.C. Deb. 63, November 5, 1958).

On December 10, 1958, the Minister stated that the total of the British Transport Commission's investment for 1959 would be rather more than £200m. and the Commission proposed to allocate well over £170m. of this to the railways (597 H.C. Deb. 67).

On December 11, 1958, the House of Committee debated the Second Reading of the Transport (Borrowing Powers) Bill which extends the ordinary borrowing powers of the Commission and the powers under the Transport (Railway Finances) Act, 1957. The Minister stated that the Commission was making a full, detailed and urgent review of the whole modernisation plan (597 H.C. Deb. 514-635).

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the Commission (H.C. 319 of 1957-58).

Statutory powers. The British Transport Commission Act, 1958 (6 & 7 Eliz. 2, c. xlv), has received the Royal Assent.

Transport tribunal. See TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 82).

PARLIAMENT

Estimates Committee (House of Commons)

Reports. The Select Committee on Estimates has published its 6th Report on Treasury Control of Expenditure (H.C. 254-I of 1957-58); its 7th Report on Nature Conservancy (H.C. 255 of 1957-58); and Minutes of Proceedings (H.C. 307 of 1957-58).

The Committee published its 1st Special Report of 1958-59 (on appointment of sub-committees and allocation of estimates) (H.C. 21 of 1958-59); and its 2nd Special Report containing the observations of the Minister of Power on the 2nd Report of 1957-58 (on that Ministry); also containing the observations of the Home Secretary on the 1st Report of 1957-58 (on Police (England and Wales)) (H.C. 22 of 1958-59).

Offices (House of Lords)

Report. The First Report from the Select Committee on the House of Lords offices has been published. It concerns the appointment of sub-committees, and other matters (H.L. (30) of 1958-59).

Opening

For the Queen's Speech, see 594 H.C. Deb. 4-7, 212 H.L. Deb. 1-5, October 28, 1958.

Private Bills

Promotion. On December 11 and 16, 1958, the Earl of Home moved for the appointment of a Joint Committee of both Houses to consider certain matters relating to the promotion of Private Bills, particularly the extent to which proposed Private Bill enactments which would alter the powers or duties of persons other than the promoter should be allowed (213 H.L. Deb. 222-232, 325-331).

Privilege

The Sessional Committee of Privileges was nominated on October 30, 1958 (594 H.C. Deb. 461).

Procedure

Leave of absence (House of Lords). The Earl of Home stated that 135 Peers had applied for leave of absence for the remainder of the Parliament, 64 for the current session, 89 had said they did not wish to apply for leave, none had replied giving other answers, 35 had not replied, and 35 had been granted leave in default of reply (213 H.L. Deb. 318, December 15, 1958).

Select Committee. The Select Committee to consider procedure in the Public Business of the House of Commons was appointed for the new session on October 31, 1958 (594 H.C. Deb. 577-578).

Strangers. During the debate in Committee on the Representation of the People Bill, Mr. Wigg drew attention to the fact that there were Strangers present. The Chairman put the Question "That Strangers do withdraw" and, not hearing a single "No" declared that the Ayes had it, Strangers withdrew (595 H.C. Deb. 1116-1118, November 18, 1958; on the exclusion of Official Reporters, see 595 H.C. Deb. 1149-1154). The Prime Minister on November 25, 1958, thought that these matters might well be considered by the Select Committee on Procedure (596 H.C. Deb. 220-222).

Prorogation

For the Queen's Speech, see 592 H.C. Deb. 1894-1898, 211 H.L. Deb. 665-670, October 23, 1958).

Public Accounts Committee (House of Commons)

Reports. The Minutes of Evidence of the Special Report and the 1st, 2nd and 3rd Reports of 1957-58 have been published (H.C. 67-I, 106-I, 213-I, 256-I of 1957-58; see [1958] P.L. 183, 289, 402).

Representation

Statutory amendment. The Representation of the People (Amendment) Act, 1958 (7 Eliz. 2, c. 9), received the Royal Assent on December 18, 1958. The Act repeals section 88 of the Representation of the People Act, 1949 (which made it an illegal practice for more than a limited number of motor-vehicles to be used at a parliamentary election on behalf of a candidate).

Statutes

Royal Assent. The Representation of the People (Amendment) Act, 1958 (7 Eliz. 2, c. 9), received the Royal Assent on December 18, 1958 (see above, this page).

PUBLIC AUTHORITIES

Agricultural Land Commission

The 11th annual report, 1957-58, has been published (H.C. 1 of 1958-59).

Arts Council

On November 27, 1958, the House of Lords debated the report of the Arts Council for 1957 (212 H.L. Deb. 913-976).

Board of Control

The annual report to the Lord Chancellor, 1957, has been published (H.C. 261 of 1957-58).

So also has that for the General Board of Control for Scotland, 1957 (Cmd. 546).

General Optical Council

An Order has been made bringing into operation, from January 1, 1959, the provisions of the Opticians Act, 1958, relating to the establishment and constitution of the Council (S.I. 1958 No. 1954).

Iron and Steel Board

The Paymaster-General gave the names of the present membership of the Board (595 H.C. Deb. 825-826, November 17, 1958).

Iron and Steel Holding and Realisation Agency

The report and statement of accounts, for 1957-58, have been published (H.C. 29 of 1958-59).

National Parks Commission

The 9th report, 1957-58, has been published (H.C. 27 of 1958-59).

Nature Conservancy

The report, 1957-58, has been published (H.C. 12 of 1958-59).

New Towns

The reports, 1957-58, have been published for Aycliffe, Basildon, Bracknell, Corby, Crawley, Cwmbran, Harlow, Hemel Hempstead, Peterlee, Stevenage, Welwyn Garden City and Hatfield Development Corporations (H.C. 260 of 1957-58).

Sugar Board

The 1st annual report, October, 1956, to June, 1958, has been published (H.C. 306 of 1957-58).

Traffic Commissioners

The summary of annual reports, 1957-58, has been published (H.M.S.O. 55-181-0-58).

PUBLIC HEALTH

The Clean Air Act, 1956 (Appointed Day No. 2) (Scotland) Order, 1958, has been made.

Certain provisions of the Clean Air Act, 1956, were brought into operation in Scotland by the Clean Air Act, 1956 (Appointed Day) (Scotland) Order, 1956. This Order brings into operation in Scotland on December 31, 1958, the remaining provisions of the Act including those relating to dark smoke from chimneys, railway engines and vessels, grit and dust from furnaces, smoke nuisances, Crown premises and vessels owned by the Crown (S.I. 1958 No. 1931).

REMEDIES**Certiorari**

Transport Tribunal. The Transport Tribunal had upheld a refusal by a licensing authority to renew an "A" licence because the applicants had used the vehicle in a manner inconsistent with their declaration of intended user. The Divisional Court *held* that the Transport Tribunal had exercised, in a judicial manner, the discretion given them by the Road and Rail Traffic Act, 1933, s. 15 (14), and refused an application for an order of certiorari: *R. v. TRANSPORT TRIBUNAL, ex p. T. HESKETH* [1958] Crim.L.R. 684.

SCOTLAND

See AGRICULTURE (above, p. 61); COMPULSORY PURCHASE (above, p. 61); COURTS (above, p. 61); GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 62); LOCAL GOVERNMENT (above, p. 64); PUBLIC AUTHORITIES (above, p. 77); TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 81).

SUBORDINATE LEGISLATION

Parliamentary proceedings

Select Committee on Statutory Instruments (House of Commons). The Sessional Order establishing the Committee was made on October 30, 1958 (594 H.C. Deb. 461-462).

On November 5 and 18, December 2 and 16, 1958, the Committee considered 73, 37, 30 and 29 instruments respectively and resolved that it was unnecessary to draw the special attention of the House to them. The Committee asked for memoranda from Government Departments in respect of six instruments.

In their Third Report, the Committee drew the special attention of the House to the Control of Borrowing Order, 1958 (S.I. 1958 No. 1208), on the ground that it made unexpected use of the powers conferred by the statute under which it was made. In this Third Report also, the Committee drew the special attention of the House to the Rules of the Supreme Court (No. 2), 1958 (S.I. 1958 No. 1246), on the grounds that they made unusual and unexpected use of the powers conferred by the statute under which they were made. The Committee issued a Special Report which stated that the Committee, having received a letter from the Lord Chancellor's Department consequent upon their Report relating to the Rules of the Supreme Court (No. 2), 1958, proceeded to lay it before the House. The letter stated that the Supreme Court Rule Committee had decided to substitute a new rule for the rule to which the Committee took exception (H.C. 5, 5-II, 5-III, 5-III-I, 5-IV).

Special Orders Committee (House of Lords). In the First and Second Reports, the Committee examined five statutory instruments. The Committee found that one instrument was not founded on precedent, but that all could be passed by the House without special attention and all could be approved without further special inquiry (H.L. (13) (29) of 1958-59).

TOWN AND COUNTRY PLANNING

Bill

An explanatory memorandum of the contents of the Town and Country Planning Bill has been published as a White Paper by the Minister of Housing and Local Government and the Scottish Office (Cmnd. 562).

Development charge

The London County Council acquired over two hundred acres of land for developing as a housing estate. On part of the land the council had to meet heavy expenditure on site works, in consequence of which the value of the land as a whole for building purposes was less than the cost of such works. The Central Land Board claimed £22,500, as a development charge, on the footing that the development permission had increased the value of the land, in that the council was free to carry out the development as far as it was profitable, and was under no legal obligation to develop the less profitable part. Danckwerts J. made a declaration in favour of the council that the land with the benefit of the planning permission ought to be valued on the footing that the council would proceed to carry out the whole of the planned operations within a reasonable time. On appeal, *held*, dismissing the appeal, that

in accordance with the scheme of the Act a development charge was exigible on actual and not on hypothetical operations; so that, in assessing such a charge, regard must be had to the amount by which the value of the entirety of the land concerned, with the benefit of planning permission for the whole of the proposed operations, exceeded the existing use value, on the footing that the whole of such operations would in fact be carried out. Further, the execution by the council, or by any purchaser from them, of only the profitable parts of the scheme would have constituted a breach of faith with the local planning permission: *L. C. C. v. CENTRAL LAND BOARD* [1958] 1 W.L.R. 1296; [1958] 3 All E.R. 676, C.A. (affirming decision of Danckwerts J.).

Planning permission. Section 14 (1) of the Town and Country Planning Act, 1947, provides: "... where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit. ..." The conditions must be such as the planning authority thinks fit having regard to their statutory duties and to local planning considerations.

On December 5, 1952, the defendant council granted planning permission under section 14 (1) of the Town and Country Planning Act, 1947, to build a pair of semi-detached cottages within the Metropolitan Green Belt on the condition that: "The occupation of the houses shall be limited to persons whose employment or latest employment is or was employment in agriculture as defined by section 119 (1) of the Act of 1947," or "in forestry or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid." *Held*, that the condition was invalid in that it was *ultra vires* as it could not fairly and reasonably be related to any local planning considerations: *FAWCETT PROPERTIES v. BUCKINGHAM COUNTY COUNCIL* [1958] 1 W.L.R. 1161; [1958] 3 All E.R. 521, Roxburgh J.

On July 29, 1955, planning permission was granted to A in the following terms: "... to develop land in accordance with the proposals set out in your application ... for badge manufacture ... subject to the conditions specified in the schedule attached hereto. ..." The Schedule provided: "(1) The property shall not be used for any other purpose including any other purpose in Class III of the Town and Country Planning (Use Classes) Order, 1950. ... (2) There shall be no detriment to the amenities of the area by reason of noise, vibration, smell, smoke, fumes or dust." The council received complaints about noise and vibration which came from A's premises. Accordingly, the council served an enforcement notice on the applicants under section 23 of the Act, requiring them to discontinue the use of certain machinery in a manner such as to cause a nuisance. By an originating summons under Ord. 54A, A challenged the validity of the enforcement notice on the grounds (a) that the notice complained of a breach of conditions allegedly attached to a grant of planning permission, whereas the permission, on a true construction, contained no conditions within the Act; (b) that the notice failed to specify with sufficient and proper particularity the alleged failure to comply with the requirements of the Town and Country Planning Act, 1947; and (c) that the notice complained of certain activities which did not constitute development within sections 12 and 119 of the Act, and accordingly planning permission could not be required for the continuance of the activities, which were not properly the subject of a notice under section 23 of the Act. *Held*, (1) that the permission, on its true construction, did contain conditions, and that they were proper conditions; (2) that it was alleged that there had been a detriment to the amenities of the area by reason of the noise and vibration, and that since this had been particularised by the identification of the machines, the notice contained sufficient particularity; and (3) that although the manner of the operation of the machines in question would not constitute development for which permission would be required, the propriety of the notice had to be judged according to whether it constituted a breach of the conditions, and the noise and vibration of the machines might easily

have interfered with the amenities, in breach of the conditions: *ALAN MARKOVITS v. HOVE BOROUGH COUNCIL* (1958) 9 P. & C.R. 292, Lloyd-Jacob J.

Purchase notice

In considering under proviso (b) of section 19 (2) of the Town and Country Planning Act, 1947, whether land, in respect of which a purchase notice has been served, could be capable of reasonably beneficial use by the carrying out of development, the Minister may, pursuant to section 19 (2A), only direct that permission shall be granted for development specified in Sched. 4 to the Act. Lessees of a vacant site, having been refused permission to develop the site by building shops on it, served a purchase notice on the local authority. The notice was transmitted to the Minister, who refused to confirm it, taking the view that the land could be developed for residential purposes, and directed under proviso (b) of section 19 (2) that planning permission would be granted for such purposes if application were made. *Held*, that the development proposed was not of a class specified in Sched. 4 to the Act and therefore by virtue of section 19 (2A) could not be taken into account; accordingly, the Minister had acted *ultra vires* and certiorari would issue to quash his decision: *R. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT, ex p. RANK ORGANISATION* [1958] 1 W.L.R. 1093; [1958] 3 All E.R. 322, D.C.

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

General

Council on Tribunals. The names of members were given on December 3, 1958, as: Lord Reading (Chairman), the Hon. R. E. B. Beaumont, Mr. D. B. Bogle, Sir Herbert Brittain, Mr. H. Collison, Earl of Cranbrook, Miss Vera Dart, Mr. E. Milner Holland, Q.C., Major-General Sir Aymer Maxwell, Mr. H. Wentworth Pritchard, Lord Strathalmond, Viscountess Ridley, Mr. H. W. R. Wade.

The Scottish Committee will consist of Sir Hugh Rose (Chairman), Sir Aymer Maxwell, Mr. Bogle, Mr. W. P. McGinniss, Mr. J. P. Morrison, Mr. I. H. Shearer, Q.C., and a further member still to be appointed (596 H.C. Deb. 156-157; see also 212 H.L. Deb. 1068-1073).

Tribunals and Inquiries Act, 1958. An Order has been made providing that January 1, 1959, is the appointed day for section 3 (relating to the appointment of chairmen and panels) (S.I. 1958 No. 2079).

Disciplinary bodies

General Medical Council Disciplinary Committee. The General Medical Council Disciplinary Committee (Procedure) Rules Order in Council, 1958, has been made.

The rules approved by this Order revoke and replace with certain amendments the Medical Disciplinary Committee (Procedure) Rules, 1951, which have hitherto regulated procedure in connection with erasure of names from the register of medical practitioners for conviction of crime or for infamous conduct, or on grounds of fraud or error, and, in certain circumstances, the restoration of names to the register.

The principal amendments are as follows:

- (a) the rule relating to the reception of evidence by the Committee has been widened and clarified (r. 43).
- (b) amendments in pursuance to the Medical Act, 1956, have been made throughout the rules.
- (c) the opportunity has been taken of making a number of other amendments, and in particular:
 - (i) provisions in Parts II and III relating to the issue of notices of inquiry have been clarified;

- (ii) the Committee are now empowered to find a practitioner guilty of infamous conduct before they determine whether to postpone judgment (r. 23); and
- (iii) the procedure for making application for restoration has been prescribed more fully (r. 39) (S.I. 1958 No. 1805).

Lands Tribunal

The Lands Tribunal (Amendment) Rules, 1958, have been made.

These rules amend the Lands Tribunal Rules, 1956. Rule 2 deletes an obsolete definition, and Rules 3 and 4 make amendments necessitated by the transfer to the Lands Tribunal of the jurisdiction of the General Claims Tribunal set up under the Compensation (Defence) Act, 1939 (S.I. 1958 No. 1746).

National service

Umpire's decisions. A selected decision by the Umpire in respect of an application for postponement of liability to be called up for service under the National Service Acts, 1948–55, has been published by the Ministry of Labour and National Service (N.S. Code 2 Pamphlet No. 3/58 containing Decision No. 370/58 N.S.).

Scottish Land Court

Report of the proceedings of 1957 under the Agriculture (Scotland) Act, 1948, Agriculture Holdings (Scotland) Act, 1949, Agriculture (Miscellaneous War Provisions) Act, 1940, Hill Farming Act, 1946, Small Landholders (Scotland) Acts, 1886–1931, and Crofters (Scotland) Act, 1955, has been published (Cmnd. 506). Appendices to proceedings under the Small Landholders (Scotland) Acts, 1886–1931 and other Acts have been published separately (H.M.S.O. 49–133–0–57).

Transport Tribunal

Proceedings have been published in the matter of the application of the British Transport Commission; to confirm the B.T.C. (Passenger) Charges Scheme, 1958; first, second, third and fourth days (H.M.S.O. 88–817–1, 2, 3, 4).

Valuation courts

Debate. On December 1, 1958, the House of Commons debated the refusal of valuation courts to allow the postponement of a hearing on application (596 H.C. Deb. 985–994).

WALES

Compulsory teaching of Welsh

Debate. On November 26, 1958, Lord Raglan asked the Government whether, in their opinion, the teaching of the Welsh language to children against the wishes of their parents was in accordance with section 76 of the Education Act, 1944. A debate followed (212 H.L. Deb. 845–906).

Council for Wales and Monmouth

On November 20, 1958, the Prime Minister defended his appointment of the Minister of Housing and Local Government and Minister for Welsh Affairs as chairman of the Council until the new Council fell to be appointed in September, 1959. During this period a constructive review of the Council's functions is to be carried out (595 H.C. Deb. 1323–1324; see also 596 H.C. Deb. 26–27, November 25, 1958; and 596 H.C. Deb. 553–554, November 27, 1958).

On December 16, 1958, the Minister was asked why five members of the Council had resigned. He said that the former chairman had resigned principally because he thought the relationship between the Council and the Government had not been close enough; and that the other four resigned because, amongst other reasons, they thought that the appointment of the Minister as chairman would frustrate the Council's work (597 H.C. Deb. 944-947).

See also LOCAL GOVERNMENT (above, p. 64).

WIRELESS AND TELEVISION

Programme bias

On November 13, 1958, the House of Commons debated an allegation that the British Broadcasting Corporation had transmitted a biased and false account of the General Strike in a Schools broadcast (595 H.C. Deb. 714-724).

Reports

The annual report and accounts, 1957-58, of the B.B.C. have been published (Cmnd. 533).

The annual report and accounts, 1957-58, of the Independent Television Authority have been published (H.C. 2 of 1958-59).

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Colonial Development Corporation. On December 4, 1958, the Prime Minister answered questions urging the extension of the activities of the Corporation to cover enterprises in the independent parts of the Commonwealth (596 H.C. Deb. 1362-1364).

Court decisions. On October 23, 1958, the Secretary of State for the Colonies gave information concerning the revisionary powers of courts in colonial and protected territories (592 H.C. Deb. 240-246).

Trade and Economic Conference. A report has been published of the Commonwealth Trade and Economic Conference, which met in Montreal from September 15 to 26, 1958. It arose from a proposal put forward by the Canadian Prime Minister in the meeting of Commonwealth Prime Ministers in June, 1957. At the meeting of Commonwealth Finance Ministers at Mont Tremblant, Quebec, in September, 1957. Ministers agreed that the Conference should be held in 1958 and made arrangements for the preparatory work to be carried forward. The report contains a detailed record of the work done at the Conference and of the agreements reached for further action. It is divided into sections dealing, respectively, with Trade, Commonwealth Problems and Agriculture Development, Education, Round-the-World Telephone Cable and Consultation on Economic Matters (Cmnd. 539).

Aden

The Aden Colony (Amendment) Order, 1958, amends the provisions of the Aden Colony Orders, 1936 to 1956, relating to the composition of the Legislative Council and provides for the appointment of a Speaker. It also makes provision regarding consultation by the Governor with the Executive Council (S.I. 1958 No. 1747).

The Aden Colony (Amendment) (No. 2) Order, 1958, amends provisions in the Aden Colony (Amendment) Order, 1944, relating to the introduction of Bills in the Legislative Council (S.I. 1958 No. 2185).

Basutoland

Constitution. In September, 1955, the Basutoland Council which is at present an advisory body only, passed a motion asking that it should be given power to make laws in all internal matters. In July, 1958, the Council approved a detailed report for this purpose. In November, 1958, a delegation arrived in London for discussions with the Government (595 H.C. Deb. 83, November 14, 1958).

On December 15, 1958, the House of Commons debated Basutoland, on the adjournment (597 H.C. Deb. 907-918).

On December 18, 1958, the Earl of Home made a statement on the outcome of the discussions. He said that agreement had been reached on all essential features; that a Legislative Council would be established of eighty members, of whom half would be elected by district councils; that there would be an Executive Council of four unofficial and four official members. A White Paper is to be published giving full details (213 H.L. Deb. 472-480).

Report. The Colonial Report, 1956, has been published by the Commonwealth Relations Office.

Borneo

Report. The Colonial Report, 1957, for North Borneo has been published by the Colonial Office.

Buganda

The Buganda Constitution (Appeal to Privy Council) Order in Council, 1958, regulates the procedure which must be followed in appeals from a determination by the High Court of Uganda of a reference to that court by the Governor of Uganda of a question relating to the interpretation of the constitution of Buganda (S.I. 1958 No. 1748).

Cyprus

Developments. A White Paper was published in October, 1958, on the discussion on Cyprus in the North Atlantic Treaty Organisation (Cmnd. 566).

The Government's plan for Cyprus was reaffirmed in a statement by the Prime Minister on August 15, 1958 (it is set out in [1958] P.L. 414-415).

Mr. Macmillan's statement met with an adverse reception from the Greek Government, but was accepted by the Turkish. In a letter of August 19 to Mr. Macmillan, Mr. Karamanlis, the Greek Prime Minister, reasserted the claim for self-determination for the Cypriots. During the discussions in Athens, he said, he had asked that no third government be involved in the administration of the island, that a single legislative assembly should be instituted, and that the numerical composition of the Governor's council should correspond to that of the population. Not only had these modifications not been made, but a new element "which would disrupt the unity of the population" had been added, namely, the proposed separate Greek and Turkish Cypriot municipal councils. The Greek Government regretted that they were unable to co-operate in the application of the plan, and therefore did not intend to appoint a representative to co-operate with the Governor.

In a statement to the Press on August 25 the Turkish Minister for Foreign Affairs emphasised that Turkey wanted partition as the final solution, but said that the Government, while maintaining that point of view, "has decided to support the British Government in the application of the plan in order to show good will in the face of the positive efforts which are being made by the British Government." On September 30 the Turkish Consul-General in Nicosia, Mr. Burhan Ishin, was appointed Turkish Government representative under the plan.

The Secretary-General of NATO, M. P.-H. Spaak, visited Athens on

September 23. On the following days the Cyprus question was discussed in the North Atlantic Council in Paris.

On September 22, 1958, Archbishop Makarios granted an interview to the Vice-Chairman of the British Labour Party, in which he set out his present position in the Cyprus dispute. He restated this on September 27 in a formal proposal to the British Government. After reiterating his opposition to Greece and Turkey being involved in the dispute, he suggested that, after a fixed period of self-government, Cyprus should become an independent State linked neither to Turkey nor to Greece. This status of independence should not be changeable, either by union with Greece, by partition or by any other way, unless the United Nations should approve such a change, but membership of the British Commonwealth would not be incompatible with the proposed status. He suggested that, with this aim in view, the British Government should sit down with representatives of the Cypriot people to work out a constitution for self-government. When this had been drawn up, it should operate for an agreed period, after which the status of independence would come into effect.

It was announced on September 27 by Mr. Averoff, the Greek Foreign Minister, that he was in full agreement with the Archbishop on the future handling of the Cyprus dispute (Commonwealth Survey, C.O.I., October 14, 1958; see also 594 H.C. Deb. 743-747, 766-768, November 4, 1958).

On November 12, 1958, the Prime Minister made the following statement:

"On October 30, the Foreign Secretary explained to the House the position with regard to the discussion on Cyprus in the North Atlantic Treaty Organisation, and, on October 31, Her Majesty's Government issued a White Paper publishing the relevant documents. This makes abundantly clear the sincere and continuous efforts which we made to make possible a conference on the basis of the North Atlantic Treaty Organisation discussions. The Greek Government have subsequently issued a statement commenting on the White Paper.

Although Her Majesty's Government cannot altogether accept this Greek version of events, I do not think it would be helpful for me now to engage in further controversy over these past exchanges. It is important to note that there has been general agreement that, whatever might be the appropriate final settlement, such a solution was unlikely to be reached immediately, and it was, therefore, necessary to find an interim arrangement. It would, however, be necessary to ensure that such an interim arrangement did not prejudice any final solution. It was made clear that, as well as a general discussion on a possible final long-term solution, particular attention should be given by the conference to this point.

We still hope that the Greek Government will, in due course, find it possible to come to the conference table on the basis which was virtually agreed in the North Atlantic Treaty Organisation discussions. We ourselves are still willing to attend on that basis.

As the House knows, the Greek Government have tabled on the agenda of the General Assembly of the United Nations an item entitled, 'The Question of Cyprus.' Before long, we may expect a debate on this item. We are quite ready to make clear our position to other members of the United Nations. We would explain, in particular, our own policy, which we believe to be the fairest compromise attainable in present circumstances. We would also make clear that we have tried, and still desire, to arrange a conference which would discuss not only our policy and amendments to it, but also any ideas for a long-term solution. Nevertheless, it would be our endeavour that the debate in the United Nations should not make agreement more difficult and should, in fact, facilitate the convening of the conference which once seemed so near.

I now turn to the position in the island. Terrorism continues, and has recently taken new forms. In addition to attacks on the security services, on patrols and on military installations, there has been an increase in murderous

violence against civilians. I regret to say that nine have been murdered in the last five weeks. In countering these measures, the Governor is acting throughout with the full support of his military advisers; and I would like to make it clear from the start that we have complete confidence in the Governor and his advisers, both civil and military. I must add with equal force that there is the fullest co-operation and confidence between the civil and military sides.

Various new precautions are being taken and new measures introduced. In certain respects, these have been successful. The number of ambushes is steadily falling. It is, indeed, because of these successes that the terrorists are turning towards attack upon unarmed civilians. In this situation, the Governor is being given, and will be given, every help and support that he requires in the administrative and legislative field. At the same time, every requirement of personnel or material that the director of operations needs will be made available to him.

We are convinced that by far the greatest proportion of Cypriots are tired of the whole terrorist situation, but the House will appreciate that they live in an atmosphere of fear. Until we can make further progress in attacking the evil at its root, we shall not command their co-operation.

Many suggestions—some very helpful—have been put to me and to my right hon. and learned friend (the Secretary of State for Foreign Affairs) and have been passed on to the Governor. We must, however, bear in mind that, while we are obliged to take security measures, such as the dismissal of Cypriots employed in military installations and camps, we have no desire to resort to punitive retaliatory measures against the population as a whole, although such measures may be justified in special cases.

I must now say a word about the British civilians. I would like to pay tribute to their courage. It is what we have learned to expect, and it is reinforced by the enthusiastic readiness of people in this country to volunteer for work in Cyprus. This must have impressed the House.

Some criticism has been made as to the recent decision of the Governor to arm civilians. Here, I am content to rest upon, and support, the Governor's judgment. The legal position has, of course, been fully safeguarded.

To sum up, I think that the House and the country can have full confidence in the men on the spot, and that we can best help them by giving them our full moral and practical support.

There are thus two aspects of our Cyprus policy today. We are going forward, on the one hand, with a constructive policy for political progress in Cyprus, and we shall proceed quietly and unprovocatively with the arrangements contemplated under that policy. We shall also continue the search for a policy agreed by all parties concerned, inside and outside the island. But, on the other hand, we shall not be deterred by violence or the threat of violence, and we shall impose whatever measures are necessary to maintain security and good order and to prevent further loss of life. There is no contradiction between these two aspects of our policy.

Peace and security are the only sure foundations for political progress. We shall combat terrorism with all possible vigour; at the same time, we shall continue our efforts to reach a political agreement. It would be a great help to us in this double task if the Greek Government and the Greek Cypriot leaders would dissociate themselves from the campaign of horror and violence in the island" (595 H.C. Deb. 387-399; also 212 H.L. Deb. 406-412).

On December 10, 1958, the Prime Minister made a further statement in the course of which he said: "After two weeks of debate on the Cyprus question, the General Assembly of the United Nations has passed a short resolution in very general terms. At one time there were seven different draft resolutions before the Political Committee. Some of these would have been acceptable to us; others, we thought, pointed too much in the direction of a particular final solution.

The Minister of State for Foreign Affairs took the opportunity of the

debate in the United Nations to give a full explanation of our policy. He described in detail the British plan with which the House is familiar. He also explained the lengths to which Her Majesty's Government have gone in their endeavours to reach an agreement for the holding of a conference at which the British plan could be discussed and amendments to it agreed, and at which the final solution could be discussed. We still believe that useful progress could be made through a conference, either confined to the parties directly concerned, including, of course, Cypriot representatives, or with the assistance of others chosen by agreement.

The proceedings in the General Assembly revealed a wide measure of understanding of the complexity of the Cyprus problem and not a little sympathy for the efforts which Her Majesty's Government have made to deal with it. They also, I think, revealed some reluctance on the part of many of those not directly concerned with the problem to try to lay down the conditions on which a settlement should be sought. The resolution finally adopted avoided this, and simply expressed confidence that continued efforts would be made by the parties to reach a peaceful, democratic and just solution in accordance with the Charter of the United Nations. That is certainly our hope.

It is right that a little time should now be allowed for the Governments concerned to consider their position in the light of the United Nations' debate. Next week, in Paris, there is a ministerial meeting of the North Atlantic Council which will be attended by my right hon. and learned Friend the Foreign Secretary, and I have every expectation that the Foreign Ministers of Greece and Turkey will be present. No doubt advantage will be taken of this occasion for confidential discussions between those who have been principally concerned. I feel sure that this approach is the most likely to be fruitful.

As we have already made clear, we are ready to discuss with our Greek and Turkish allies the interim arrangements for the administration of Cyprus described in my statements of June 19 and August 15; and we are willing, as we have said, to put into effect any amendments to our announced policy on which agreement can be reached. These offers remain open and can be taken up at any time. We regretted that the Greek Government did not feel able to agree to a conference on the lines discussed in NATO last October. But the position may now have changed. In any case, we continue to hope that in time the Greek Government will see the advantages to the Greek Cypriots and to Greece of the offers which we have made to them.

Whatever the difficulties, progress has been made in narrowing the area of dispute. For our part, we shall do our utmost to reach agreement."

The leader of the Opposition, Mr. Gaitskell, asked whether the Government would enter into private conversations in NATO with an open mind, and whether it would not help matters if they were to say that they no longer insisted on proceeding with their plan but were willing to make a fresh start. The Prime Minister replied: "We will go into any conference with an open mind and will implement any modifications of the short-term plan that may be agreed, and we would discuss any final settlement; but I think that it would be a great error to throw everything into the melting pot again. I think that we should proceed quietly and unprovocatively to make progress with all the measures which we have proposed, as they have been amended, to try to meet all concerned; but I think that our first purpose must be . . . to see whether we cannot revive and make effective what so very nearly did take place—a conference on the lines proposed a few weeks ago" (597 H.C. Deb. 343–355; see also 213 H.L. Deb. 186–193; and 597 H.C. Deb. 1307–1309).

Gambia

Report. The Colonial Report, 1956 and 1957, has been published by the Colonial Office.

Ghana

Ghana and Guinea. The following joint declaration was made in Accra on November 23 by the Prime Minister of Ghana, Dr. Kwame Nkrumah, and the Prime Minister of the Republic of Guinea, M. Sekou Touré:

"Inspired by the example of the thirteen American Colonies which, on the attainment of their independence, constituted themselves into a confederacy which ultimately developed into the United States of America; inspired also by the tendencies among the peoples of Europe, Asia and the Middle East to organise in a rational manner; and inspired further by the declaration of the Accra conference regarding the African personality.

We, the Prime Ministers of Ghana and Guinea, on behalf of our respective Governments, and subject to ratification by our respective National Assemblies, have agreed to constitute our two states as the nucleus of a union of west African states.

Conscious of the fact that an aspiration for closer union is shared by all the peoples of our continent, we appeal to the Governments of the independent states of Africa, as well as to the leaders and peoples of the territories still under foreign rule, to support us in our action. In this same spirit, we would welcome the adherence to this union of other west African states.

As a first step, we have agreed to adopt a Union flag, and to develop between our two Governments the closest contacts in order to harmonise the policies of our two states, especially in the fields of defence, and foreign and economic affairs.

Our next step will be to work out a constitution giving effect to the establishment of the union.

Finally, we affirm that the action which we are taking with a view to achieving a union of west African states is not in any way designed to prejudice the present or future relations between Ghana and the Commonwealth on the one hand, and the Republic of Guinea and the French Community on the other."

A second joint declaration, also made on November 23, stated: "In order to stabilise the national economy of the Republic of Guinea in the present transitional period, the Government of Ghana is prepared, subject to parliamentary approval, immediately to place a credit of ten million Ghanaian pounds (£G 10 million) at the disposal of the Government of Guinea, and to afford Guinea such technical and administrative assistance as may be necessary to strengthen the new state.

The Republic of Guinea is pleased to accept this offer of assistance, which Guinea regards as a concrete manifestation of African fraternity and solidarity."

The following statement was made in the House of Commons by the Prime Minister on November 27.

"Ghana is, as the House knows, an independent state and a valued member of the Commonwealth. Last Saturday, Dr. Nkrumah informed me that negotiations were in progress and that it was likely that a joint statement would be made on Sunday indicating the intention of himself and the Prime Minister of Guinea to enter into a union. On Sunday I received the text of the joint declaration issued by the two Prime Ministers in Accra.

This declaration states that the Prime Ministers of Ghana and Guinea have agreed to constitute their two states as the nucleus of a union of west African states. It is my understanding, however, that no separate union of Ghana and Guinea has come into existence and indeed the declaration speaks of harmonising the policies of the two states.

This is an interesting development which may have political, constitutional, economic and other implications, not only for Ghana and Guinea, but also for the Commonwealth and other countries. I know that the Government of Ghana value their association with the Commonwealth; and the joint declaration says that the actions which the two Prime Ministers are taking

are designed not to prejudice in any way the present or future relations between either Ghana and the Commonwealth or between the Republic of Guinea and the French Community. My impression is that almost all the detailed arrangements between Ghana and Guinea which would be necessary to give effect to this statement of intention on behalf of the two Prime Ministers have yet to be worked out. I have no doubt that Dr. Nkrumah will keep all his Commonwealth colleagues informed as the negotiations proceed" (596 H.C. Deb. 556-557; Commonwealth Survey, C.O.I., December 9, 1958).

Kenya

Constitutional proposals. On November 27, the Secretary of State for the Colonies circulated a copy of a dispatch containing his reply, addressed to the governor of Kenya, to constitutional proposals submitted last June by the African elected members of the Kenya Legislative Council.

The main proposals were that the number of African constituency elected members (at present 14) should be increased; that the specially elected seats and the Council of State established under the constitution introduced last April should be abolished, and that certain changes should be made in the Council of Ministers.

The Secretary of State found himself unable to accede to any of these requests, and, in his dispatch to the Governor, he set out the principles upon which the recent constitutional innovations were based and the reasons against introducing the changes proposed by the African elected members.

The following is the text of the dispatch:

"I have given careful study to the constitutional proposals submitted by the African Constituency Elected Members under cover of Mr. Mboya's letter of June 28, and I shall be grateful if you will reply on my behalf to the African Elected Members Organisation in the sense of the following paragraphs.

2. The proposals that the number of African Constituency Elected Members in Legislative Council should be increased and that the specially elected seats and the Council of State should be abolished run directly contrary to the principles underlying the present constitutional arrangements which were put into force as recently as April of this year. In forming my judgment of what I consider to be a fair solution of current political problems in Kenya, I was certain that any new arrangements must rest firmly on four main principles:

- (1) the maintenance of a Government in which all races in the country take part;
- (2) a limited by final increase in communal representation in the legislature;
- (3) the creation of opportunities for representation in the Legislative Council based on the non-communal principle; and
- (4) the institution of a body of local people who, from their background of wisdom and impartiality, can prevent unfair discrimination detrimental to any community.

I linked those principles with a decision that the proportions between and within the groups for whom the specially elected seats are preserved shall not be varied during the next ten years and that any alteration in the total number of such seats or in the method of filling them will be subject to the approval of the Council of State.

3. In the months that have elapsed since the new constitution came into force I have been aware of no circumstance which would justify any major departure from the settlement made by Her Majesty's Government. I regret, therefore, that I am unable to entertain proposals for constitutional change designed to alter in any significant way those features of the present constitution which I regard as fundamental to ordered progress in Kenya. For these reasons, I cannot agree to the proposals relating to the increase in the number of African Constituency Elected Members, the abolition of the specially elected seats and the abolition of the Council of State.

4. As regards the proposals concerning the Council of Ministers, I would emphasise that the decisions recorded in Command 309 represent my considered judgment of the most efficient arrangements that could be devised in present circumstances in relation to the size and balance of the Council. It is my view that, for some time to come, these arrangements must be afforded extensive testing. In due course, however, and after sufficient experience had been gained of their effectiveness, I and the Government of Kenya would be very ready to review the existing arrangements to consider whether further adjustments were justified in the circumstances then prevailing. It will be recalled that under the terms of section 10 of Command 309 you have discretion to make adjustments in the burden of responsibility carried by individual Ministers, and I have no doubt that you will have recourse to this as and when circumstances warrant. In this connection I must point out that the scope of the second portfolio reserved for an African still remains to be finally determined. Were the African Constituency Elected Members to put forward views about this very important matter, they would be given the most careful consideration. For the reason stated earlier in this paragraph, I am not disposed to reconsider, so soon after their inception, the question of the posts of Assistant Ministers. In existing circumstances I hold these to be a valuable feature of the present constitutional arrangements, but I would not rule out a re-assessment of the position in the light of further experience.

5. In explaining, as in the foregoing paragraphs, why I cannot contemplate radical changes in the constitution, I wish to make it clear that, provided the principles enunciated in paragraph 2 are safeguarded, and subject to the decision on the specially elected seats referred to in the same paragraph, there is no reason why the detailed working of the constitutional arrangements should not come under review from time to time. It is my view that the constitution is sufficiently flexible to provide opportunity at appropriate periods for the experience of its working to be discussed and assessed, and for constructive proposals to be put forward designed to make improvements.

6. In considering the whole question I have carefully studied the declaration of principles in the first part of the memorandum and the following statement of the aims of the African Elected Members' Organisation. I recognise that the adherence of the African Constituency Elected Members to these principles and purposes is sincere, and I naturally respect their evident desire to aim at a democratic solution of the constitutional problems of Kenya. The concept of democracy relates as much to the type of society to be found in any country as to the particular features of the machinery of government. It has been the experience of countries like the United Kingdom that the evolving machinery of government has kept pace with the changing features of the social scene, and particularly with the development of a fairly homogeneous population, where geographical unity and a sense of corporate nationhood have superseded, through a process taking centuries to complete, the cultural, racial and religious cleavages which for long divided the country. The present constitutional pattern in Britain and other advanced territories in the Commonwealth rests on several features of society which are not yet present in Kenya, and these are unlikely to emerge until mutual suspicions have been allayed, and ethnic and cultural differences have lost the undue political importance attached to them today. One important feature of a mature society is a readiness to accord weight and respect to the opinions and interests of numerically smaller groups and a complementary confidence on the part of such groups. This must underlie the free working of fully developed democratic institutions. It is, therefore, to the promotion of a sense of nationhood that we must advance, and I can conceive no more potent instrument to this end than the development of a multi-racial or non-racial Council of Ministers, in which policies can be evolved aiming at an integrated approach to the blending of the aptitudes and aspirations of the various communities in

a sense of national purpose and achievement. This principle of the participation of all groups in the executive government of the country is a gateway to the future and not a barrier to the advancement of any community. In accordance with my dispatch No. 662, your present Ministers have all accepted the obligation 'to promote racial harmony and friendliness and to develop opportunities for all loyal subjects, irrespective of race or religion, to advance in accordance with character and ability.' This pledge might well be adopted by all as a major signpost towards the future of Kenya.

7. Within the ambit of its fundamental principles, the constitution is thus intended to evolve so as to ensure that the machinery of government can be modified from time to time, to take account of the development and progress of the peoples for whose benefit it is designed. I venture to express my hope that African Members of the Legislative Council will be prepared to enter discussions, first of all with you as Governor and thereafter with the other groups, so that a determined effort can be made to create a basis for mutual understanding. If this course can be set in Kenya, I am convinced that responsible members of all communities will come to realise that the present settlement is expressly designed as the instrument which, as it is modified during the years, will make possible the progress of the country to full nationhood" (596 H.C. Deb. 533-537; Commonwealth Survey, C.O.I., December 9, 1958).

Report. The Colonial Report, 1957, has been published by the Colonial Office.

Nigeria

Constitution. The resumed conference was opened on September 29, 1958, and concluded on October 27, 1958. The Report has been published. Its provisions included the following:

1. The conference agreed to recommend that constitutional provision should be made for the Northern Region to become self-governing on March 15, 1959. The provisions for self-government should follow the pattern established in 1957 for the Eastern and Western Regions, with the variations appropriate to the circumstances of the Northern Region.

2. The conference recommended that the composition of the Federal Supreme Court should be enlarged by adding to its membership, as *ex officio* members, the Chief Justices of each of the Regions. The conference recommended that the present arrangements for the appointment of Regional Chief Justices and members of the Judicial Service Commissions in the Eastern and Western Regions should remain unchanged, and that there should be similar provision for the Northern Region on the attainment of Regional self-government. The conference recommended that, throughout Nigeria, justices of the peace should, at the appropriate constitutional stage, be appointed on the advice of the Judicial Service Commissions. It was also agreed that the appointment, dismissal and disciplinary control of judges in native and customary courts throughout Nigeria should be divorced as far as possible from political and executive control.

3. It was agreed that, while ordinary Public Service posts (including the less senior posts in the Overseas Service) should be filled on the advice of the Public Service Commissions, and without governmental intervention, the most senior posts should be filled on the recommendations of the Government of the day, and that, after independence, there should be no Regional representation in countries outside the United Kingdom.

4. Qualifications and disqualifications for Nigerian citizenship should be included in the constitution for independence, which should also provide that no Nigerian citizen should be liable to deportation or exclusion from Nigeria. An *ad hoc* committee of the conference, in Nigeria, under the Governor-General, should consider further the question of citizenship, and, if possible, complete its work by the end of April, 1959.

5. The conference reached agreement on human rights and the police, on lines which were similar to those recommended by the Minorities Commission.

6. The conference discussed a memorandum by the Government of the Northern Region on provincial administration in the Region.

7. The conference agreed that, since units of a federal state are inter-dependent, no single unit, including the Federation, should be able to amend its constitution in a way contrary to the general interests of the whole of Nigeria. Those parts of the Federal and Regional constitutions which were primarily of internal interest should therefore be amendable by a comparatively easy procedure, not requiring the concurrence of any other unit of the Federation. But the parts of the Federal and Regional constitutions which were of general concern should be entrenched, and the procedure for their amendment should require the concurrence of other units of the Federation.

In accordance with these principles, the conference agreed to recommend that ordinary provisions of the Federal constitution should be amended by a majority of not less than two-thirds of all the members of each House of the Federal Legislature. Amendment of the entrenched provisions of a Regional constitution, however, should be by a majority of at least two-thirds of all the members of each House of the Legislature of the Region concerned, with the concurrence of a majority of not less than two-thirds of all members of each House of the Federal Legislature. Amendment of ordinary provisions of Regional constitutions would be by a majority of not less than two-thirds of all the members of each Legislative House of the Region concerned.

8. It was agreed between the Secretary of State and the Southern Cameroons representatives, and subsequently approved by the conference, that no immediate constitutional changes should be made, but that it should be open to the Southern Cameroons Government, which would be formed after the elections to be held in January, 1959, to request the United Kingdom to bring certain changes into effect.

The conference unanimously confirmed that, if it proved to be the wish of the people of the territory, Nigeria would welcome the Southern Cameroons as part of the Federation, with the status of a fully self-governing Region equal in all respects to the other Regions in an independent Nigeria.

9. The conference agreed on the cases in which there should be constitutional provision for a right of appeal from the High Court to the Federal Supreme Court. It was agreed that these should be the minimum rights of appeal. It would be open to the individual legislatures to add to these rights.

There should be provision in the constitution for a right of appeal from inferior courts to the High Court, either direct, or through an intermediate court in specified cases.

10. The Secretary of State reminded the conference that, at the 1957 conference he had said that, if some time early in 1960 the new Nigerian Legislature passed a resolution asking the United Kingdom Government to agree to full self-government by a date in 1960, the United Kingdom Government would be prepared to fix a date on which they would accede to this request. The Secretary of State pointed out that, since then, there had been sixteen months' experience of regional self-government in the Eastern and Western Regions, and changes in the Northern Region and Southern Cameroons, and the conference had now agreed on the pattern of self-government for the Northern Region.

The Secretary of State said that no special significance was attached to April 2, 1960, the date which had been proposed earlier for independence. The year 1959 would be one of intense activity in Nigeria, with Regional self-government for the Northern Region, and Federal elections towards the end of the year. The date in April would give the new Government and the United Kingdom Government only three or four months in which to complete final discussions before the act of independence and the final constitution order could be drafted. He was now authorised to say that, if a resolution

were passed by the new Federal Parliament early in 1960 asking for independence, the United Kingdom Government would agree to that request and would introduce a Bill in Parliament to enable Nigeria to become a fully independent country on October 1, 1960.

The Prime Minister of the Federation and the Premiers, in their replies, expressed their deep appreciation of the Secretary of State's announcement and their desire that co-operation between Britain and Nigeria should continue after independence and that Nigeria should, on independence, become a Member of the Commonwealth (Cmnd. 569; see also 594 H.C. Deb. 741-742, November 4, 1958).

Judicial offices. The Nigeria (Constitution) (Amendment No. 4) Order in Council, 1958, amends the provisions of the Nigeria (Constitution) Order in Council, 1954, relating to the judges of the Federal Supreme Court and the High Courts of the Northern Region and Lagos and to certain other judicial offices, the grant of pensions, offences involving disqualification for election and the Judicial Service Commissions and the Directors of Public Prosecutions of the Western and Eastern Regions. It also validates certain appointments of judicial officers (S.I. 1958 No. 1958).

Pakistan

Constitutional changes. On October 7, 1958, President Iskander Mirza declared martial law in Pakistan, dismissed the central and provincial governments, and abolished all political parties, after a cabinet crisis. He also abrogated the constitution by which the Islamic Republic of Pakistan was formally inaugurated and appointed General Mohammed Ayub Khan, commander-in-chief of the Army, as chief martial law administrator.

General Mohammed Ayub Khan, in a broadcast to the nation on October 8, said: "This is a drastic and extreme step, taken with great reluctance, but with the fullest conviction that there was no alternative to it, except the disintegration and complete ruination of the country. History would never have forgiven us if the present chaotic conditions were allowed to go any further . . . I propose to use civilian agencies to the maximum. The armed forces will be utilised as little as possible."

On October 24, the former President announced the formation of a new cabinet and appointed General Mohammed Ayub Khan as Prime Minister, the office being combined with the post of chief martial law administrator and the portfolios of Defence and Kashmir Affairs.

On October 27, General Mohammed Ayub Khan took over the office of President. The change, the new President said in a declaration, would in no way affect the policies which he had outlined in his radio broadcast on October 8 and in subsequent statements.

The outgoing President, Major-General Iskander Mirza, in his declaration, said that, after the imposition of martial law in Pakistan, he had come to the conclusion that any semblance of dual control was likely to hamper the effective performance of the immense task of evolving an effective structure for the future administration of the country. He had, therefore, in the wider interests of the nation, decided to step aside and hand over all powers to General Ayub Khan (Commonwealth Survey, C.O.I., November 11, 1958).

Rhodesia and Nyasaland

Northern Rhodesia. The White Paper (Cmnd. 530) published in September (see [1958] P.L. 421) contained the following proposals by the Secretary of State for the Colonies.

In accordance with the recommendation of the Northern Rhodesian Government, the separate representation of races in the legislature is rejected, and a common roll, with a qualitative franchise, is accepted, together with the provision that, in addition to the ordinary voters' roll, there should be

"a temporary and lower set of qualifications which will enable a fair proportion of Africans to qualify at once." Although no one, once registered as an elector, will subsequently be disfranchised, this lower set of qualifications will be raised by stages, until it merges with the permanent qualifications required for registration on the ordinary voters' roll.

On the stages by which the qualifications for the special voters' roll will be raised, the Secretary of State's proposals differ from those put forward by the Northern Rhodesian Government. Instead of being raised at intervals fixed in advance, over a total period of ten years, it is now proposed that they should be raised at each stage only if, by the date in question, the number of special voters in the territory as a whole is not less than the number of ordinary voters in the territory as a whole. The Secretary of State considers that this more flexible arrangement will be "a wise precaution and a legitimate protection of African interests against the effects of a possible failure to register by numbers of Africans unfamiliar with political affairs."

The Secretary of State accepts the Northern Rhodesian Government's proposals that the new Legislative Council should consist of a Speaker, 6 official, 2 nominated, and 22 elected members; that the country should be divided into 12 "ordinary constituencies" (with a predominantly European population) and 6 "special constituencies" (with a predominantly African population) each returning 1 member; and that, for the election of the remaining 4 elected members, the 12 ordinary constituencies should be regrouped into 2 constituencies for the return of 2 members to seats reserved for Africans, and the 6 special constituencies should be grouped into 2 constituencies for the return of 2 members to seats reserved for Europeans. He agrees also with the proposal that, in the 12 ordinary constituencies and in the 2 constituencies which will return members to seats reserved for Europeans, the total of special votes cast should not count for more than one-third of the total of ordinary votes cast. He does not agree, however, that in the other constituencies the value of ordinary votes should be similarly limited. "The admission of voters with lower qualifications than those which will eventually be the sole qualifications for registration is intended to meet a temporary situation in which a sufficiently representative number of Africans is not yet qualified for the ordinary vote. The reduced qualifications of such voters make it reasonable to set some limit on the influence which they may exert, but no similar consideration exists to warrant the imposition of a limit on the influence of the ordinary voter. Nor do practical considerations require such limitation. The estimates of the numbers of persons who will qualify as special voters made it clear that such a provision is unnecessary in the 6 special constituencies where they could outnumber the ordinary voters by more than six to one, and in the two other constituencies affected the seats are reserved for Africans in any event. Moreover, to provide that the ordinary votes might in certain circumstances be devalued might prove a disincentive to efforts to attain the qualifications necessary for the ordinary vote, *e.g.*, among Africans in the 12 ordinary constituencies who might thereby as individuals find their influence on the return of Africans to the two reserved seats cut to one-third, although those were the candidates in whose election they felt the closest interest. For all those reasons, I do not propose that provision should be made for the devaluation of ordinary votes in any circumstances."

The Northern Rhodesian Government proposed that, in future, the Executive Council should be composed of the Governor, as President, 4 *ex-officio* Ministers and 5 other Ministers (of whom 4 must have been "ordinarily qualified" candidates successful in the elections); that, in addition, there should be 2 Assistant Ministers; and that of the total of 11 ministerial posts not less than 2 should be filled by Africans, of whom 1 should be a Minister.

After having considered certain criticisms of these proposals, Mr. Lennox-Boyd came to the conclusion that the constitutional instruments themselves should not make provision for the allocation of ministerial offices by race,

although in practice it would be necessary, for some time to come, for such allocation to be made. He proposes therefore that the constitutional instruments shall provide for a total of 10 Ministers, 6 of whom shall be unofficials, and that, for the present, it shall be an instruction to the Governor that 2 of the unofficial Ministers shall be Africans and 4 Europeans. He does not propose that there should be any Assistant Ministers.

The effects of the new proposals will be that every candidate for election will have to seek the votes of people of both races, and the political parties will have to frame their programmes accordingly. Nevertheless, should the electors of the majority race in any constituency wish to be represented by a member of their own race, there is a fair prospect that, in the early years, they will be able to secure this, and the minority race will, of course, have a candidate of their own race in a reserved seat. It may therefore be expected that, at the first elections, there will be 14 Europeans and 8 Africans returned as elected members. The provision for 2 nominated members will enable the Governor to correct any lack of balance arising from freakish results of elections, and meet the possibility that there might not be, among the Africans returned to the Council, 2 who were suitable for appointment as Ministers; but they will not be appointed specially to represent African interests. The 6 official members will make it possible to maintain a proper balance on controversial issues.

Concluding his dispatch to the Governor, Mr. Lennox-Boyd referred to the difficulties in reaching a solution to Northern Rhodesia's problems which would be acceptable to all the interests concerned. "It is, however, necessary," he said, "to recognise that, at the present time, any proposals which were fully acceptable in one quarter would be likely to be considered unacceptable in another—a fact which points clearly to the need for arrangements which will tend to encourage a less racial outlook.

I believe, however, that the arrangements proposed in the Northern Rhodesia White Paper, as modified in this dispatch, are appropriate to the conditions of Northern Rhodesia and represent a fair compromise between the interests of the various communities concerned . . . their most important merit is, in my view, the fact that they are designed to provide all men in public life with an incentive to consider the interests of the country as a whole and of all its inhabitants, and not only the interests of people of their own race. They provide, for members of both races, increased opportunities for participating in the conduct of the territory's affairs both in Legislative and in Executive Council without, however, undermining the ability of the Governor and his officials to carry out their responsibility to Her Majesty's Government in the United Kingdom for holding the balance in matters which affect the interests of one community or another, and are controversial. Under the existing constitution there are only four African members of the Legislative Council, and as the vote is confined to British subjects, only a handful of Africans are qualified to participate in the elections by which the elected members are returned; the African members themselves are not returned by direct election; and there is no African member on the Executive Council. The increase in the opportunities afforded to Africans for participation in public affairs under the arrangements now proposed is, therefore, naturally somewhat greater than the parallel increase afforded under them to Europeans. From the European point of view, however, the arrangements have the advantage that they are designed to ensure that the pace at which African influence in political life will increase in the future will be determined by the pace of their general advance rather than by arbitrary decisions taken from time to time" (Commonwealth Survey, C.O.I., September 30, 1958).

The proposals in the White Paper were debated in the House of Commons on November 27, 1958.

Opening the debate, Mr. Lennox-Boyd reviewed the prolonged negotiations and discussions, in both Northern Rhodesia and the United Kingdom, which

had preceded the drawing up of the proposals. In spite of every effort, it had proved impossible for the Northern Rhodesian Government to reach complete agreement on all points, and the Secretary of State had therefore found it necessary to come to his own decisions on the details of the constitution.

After summarising the proposals, the Secretary of State went on to say that, as the House knew, these had not escaped criticism. He had received communications from the Federal Party members in the Northern Rhodesian legislature, from the African members, and from one of the European members representing African interests, "all expressing disappointment either at the exclusion or at the inclusion of some feature or features in these proposals." He had also received a delegation of Africans from Northern Rhodesia and had held discussions with them, and, during the preceding few days, he had discussed with the Prime Minister of the Federation of Rhodesia and Nyasaland, Sir Roy Welensky, certain representations made by the Federal Government. "I am considering with the greatest possible care," he said, "all the representations which have been made to me. I shall also, naturally, consider with no less care any advice or suggestions which may be put forward during the course of the debate, and, before we disperse for the Christmas recess, I shall inform the House whether I have decided to make any changes in the proposals as they now stand."

He added, however, that if any alterations were made in the scheme, "they will not be alterations which will affect the fundamental principles underlying it"; and he went on to remind the House what these principles were.

The first was that the constitutional arrangements should be, as far as possible, such that participation in the political life of the country would depend, not on race but on other criteria designed to measure capacity to make a useful contribution. "I believe that our proposals are designed to provide all men in public life with an incentive to consider the interests of the country as a whole and of all its inhabitants, irrespective of race."

The second fundamental principle was that, for the time being, the Governor and his official advisers must remain in a position, in case of necessity, to hold the balance in issues which affected the interests of one community or another and were controversial. "Subject to that, it is the view of Her Majesty's Government, which I am sure this House will endorse—and this is the third fundamental principle lying behind these proposals—that the people of Northern Rhodesia should be given increasing opportunity to take part in the conduct of the territory's affairs. . . . The Governor will continue to have reserve powers so that, through him, Her Majesty's Government can, in the last resort, make sure of being able to discharge their ultimate responsibility for the good government of the territory, but if European and African unofficial Ministers can work together in the interests of the territory as a whole, as I am sure they can and will, then with the help and advice of their official colleagues, they will be able under these proposals to take the major part in guiding and directing the progress of Northern Rhodesia."

Mr. James Callaghan, leading the Opposition speakers in the debate, made a number of criticisms of the constitutional proposals. Nothing, he said, would have pleased the Opposition better than to have been able to agree with the Government about this constitution, and to have been able to say to the people of Rhodesia that there was a united view in the House of Commons on the matter. But, in fact, there was a deep-seated and fundamental difference of approach between the Government and the Opposition.

Among the principal points of criticism of the actual proposals were: the provision for devaluation of the vote under certain circumstances; alleged under-representation of Africans in the legislature; the requirement that candidates for election in the territory's six special (mainly African) constituencies must obtain a certificate of approval from two-thirds of the chiefs in the constituency; and inadequate time for the preparation of electoral registers.

The major objection, however, in Mr. Callaghan's view, was the attitude adopted by the Federal Government which, he said, was exercising undue influence over British territories under the control of the Colonial Office. The aim of the Federal Government, he alleged, was to enforce European standards in a country where the Europeans were a tiny minority and the great bulk of the population was black. The present tension in Central Africa was caused by the fact that, in this area, it was as yet undecided whether native policy would be developed on the same lines as in Uganda and Tanganyika or would go the way of South Africa, with racial *apartheid*. This was the importance and significance of the decision the British Parliament was taking. "When we vote tonight, we shall be voting not on the devaluation of the vote, or whether two-thirds of the chiefs must support a candidate, but whether Britain proposes to remain true to its pledges that the future development of Africans shall not be diverted in the interests of any other group of people."

Concluding the debate, the Under Secretary of State for Commonwealth Relations, Mr. Alport, reiterated that full consideration would be given to the views and criticisms expressed during the discussion.

On the subject of Central African Federation he said: "... the experience of this Federation since it was formed has more than justified the expectations which we had before 1953 of this bold political experiment. In the history of all federations there has always been a period of adjustment in the relationship between the new central Government and its component parts. ... What we regard as being most remarkable about the Federation during the last five years has been, not the extent and seriousness of the friction which has been aroused, but much more the smoothness with which the Federation has been able to embark on its career as a state, which we believe to have a tremendous future. Her Majesty's Government do not contemplate any possibility of amalgamation or secession in the future. We believe that the Federation has come to stay" (596 H.C. Deb. 563-697; see also 594 H.C. Deb. 749-750, November 4, 1958).

On December 18, 1958, the Secretary of State said that after considering all the representations made, he had decided that his proposals in Cmnd. 530 should stand. But, for classification he had sent a further dispatch to the Governor of Northern Rhodesia (597 H.C. Deb. 274-277, where the dispatch is set out).

Report. The Colonial Report, 1957, for Northern Rhodesia has been published by the Colonial Office.

Singapore

The Singapore (Constitution) Order in Council, 1958, makes provision for a new Constitution for Singapore. Under this Constitution Singapore is given internal self-government, the responsibility for defence and external affairs being reserved to the Government of the United Kingdom. The Constitution includes provision for an Internal Security Council and also deals with the offices of Yang di-Pertuan Negara and United Kingdom Commissioner as well as making provision for the Executive, Legislature and Judicature (S.I. 1958 No. 1956).

Somaliland

Constitutional changes. On November 27, 1958, the Secretary of State for the Colonies circulated a copy of a statement about constitutional changes to be introduced in the Somaliland Protectorate. The statement, which was made by the Governor at the opening of the Protectorate Legislative Council on November 26, was as follows:

"Arrangements are now being made for the formation of a Legislative Council with 13 elected members, and an Electoral Bill to provide for the method of election of these members will be laid before this council. There will also be provision for me to nominate up to three unofficial members. The

Legislative Council will, therefore, consist of the Governor as president, and, according to the number of unofficials up to 3 actually nominated, up to 17 official members, and up to 16 unofficial members, including 13 elected members.

It is also my intention to invite unofficial members of the Legislative Council to be associated with the working of groups of Departments, and they will be called into consultation with the Executive Council from time to time. In this way I hope that we shall be able to provide training for unofficial Somalis in the responsibilities of the Government.

This constitution provides for the introduction of the electoral system into the Protectorate for the first time, and is designed to prepare the way for further advances as soon as the unofficial members associated with the work of Departments have gained experience of Government activities.

Of course there will subsequently be further steps in constitutional advance. This, and other allied subjects, are, at this moment, being examined by the Secretary of State and his advisers, and I shall be making a further announcement in the near future. I hope this will be possible before the end of March."

Under the existing constitution, the Protectorate's Legislative Council, which first met in 1957, consists of the Governor, 3 *ex-officio* members, up to 5 nominated official members and up to 6 nominated unofficial members. The Executive Council consists of the Governor, 3 *ex-officio* members, and such official and unofficial members as the Governor may appoint.

A commission was appointed by the Governor early in 1958 to examine methods by which the unofficial membership of the Legislative Council could be made more representative. The commission's report was studied by the Protectorate Government, and proposals based on it were then submitted to the Secretary of State for the Colonies for his consideration. Subsequent discussions between the Secretary of State and the Governor led up to the recent announcement.

The Secretary of State for the Colonies said that there were, at present, 3,981 Somalis employed by the Protectorate Government. Of these, 50 were receiving advanced training abroad, while a further 65 Somali students were training abroad with a view to entering Government service on their return. In addition, a number of Somalis were training locally under departmental arrangements (596 H.C. Deb. 531-533; Commonwealth Survey, C.O.I., December 9, 1958).

The Somaliland (Electoral Provisions) Order in Council, 1958, enables the existing legislature of the Somaliland Protectorate to make provision for the election of Members to the new Legislative Council which it is proposed to establish for the Protectorate and enables registration of electors in pursuance of any such provision to take place (S.I. 1958 No. 1957).

South Africa

Two important legislative measures were passed by the South African Parliament shortly before it went into recess in September: the first concerned the lowering of the voting age and the second provided for an increase in the membership of the Cabinet.

In future the franchise will be open to white South Africans from the age of 18 instead of 21. It has been estimated that the new measure will add about 150,000—or roughly 10 per cent.—to the total electorate. The legislation does not cover Cape coloured or native voters, who are on separate electoral rolls and vote only for their own (European) representatives in the legislature.

The membership of the Cabinet has been increased from 14 to 16, and provision has been made for the appointment of up to 8 deputy Ministers (Commonwealth Survey, C.O.I., October 28, 1958).

Trinidad and Tobago

Constitutional changes. The Secretary of State for the Colonies has agreed that certain constitutional changes sought by the Government of Trinidad and

Tobago are appropriate at the present stage of the territory's development, and has undertaken to recommend them to the Queen in Council as soon as the necessary Instruments can be prepared.

The changes to be recommended may be summarised as follows:

- (a) the Governor will call upon the leader of the majority party in the Legislative Council to form a government; if no party has a clear majority of elected seats, the Governor will call upon the person most likely to command a majority;
- (b) the Chief Minister will be empowered to select and remove Ministers and Parliamentary Secretaries;
- (c) the Chief Minister, and not the Governor, will preside at Executive Council meetings. The Governor, however, in his discretion may summon a special meeting of the Executive Council at which he will preside. The name "Executive Council" will be changed to "Cabinet" and that of "Chief Minister" to "Premier";
- (d) the Colonial Secretary (to be re-designated "Chief Secretary") and the Attorney-General will retain their seats in the Cabinet and the Legislative Council, but will no longer be entitled to vote in the former;
- (e) the Public Service Commission and the Police Service Commission will be re-modelled as independent bodies with full-time chairmen, and the Governor will be bound to accept their advice except with regard to discipline and a few senior appointments;
- (f) provisions dealing with the salaries of Ministers, Parliamentary Secretaries, the Speaker and Deputy Speaker, will be deleted from the constitution, but provision will be made preventing the reduction of the salaries of the Speaker and Deputy Speaker during their continuance in office;
- (g) the Premier will not be obliged to recommend the appointment of the full number (four) of Parliamentary Secretaries;
- (h) if the Speaker is elected from outside the Legislative Council he will not have a casting vote;
- (i) so long as it appears to the Governor that the Premier commands the support of the majority of the elected members of the Legislative Council, the Governor will act in accordance with his advice in the dissolution and prorogation of the Legislative Council;
- (j) a Judicial and Legal Service Commission will be established with executive functions, except in regard to judges, in which case the Commission will be advisory to the Governor;
- (k) provision will be made for the appointment of a ninth Minister.

It was decided that the question of the transfer of responsibility for the police to a Minister should be the subject of further consultation with the Secretary of State. Mr. Lennox-Boyd was unable to reach a decision on the Trinidad Government's request that the Governor's reserved legislative powers should be removed, since there were considerable difficulties of a legal and constitutional character which had to be resolved, but he was hopeful that it would be possible for him to reach a decision before the agreed changes were submitted to the Queen in Council.

The Secretary of State welcomed the intention of the Government of Trinidad and Tobago to seek the appointment of a select committee of the Legislative Council to consider changes in the constitution of a more fundamental nature than those which had been under discussion. He felt that the time was most opportune to consider further changes of this nature—changes which would lead the territory to a constitutional position which would be more appropriate in view of the approach of the West Indies to full independence within the British Commonwealth. The prospect of full independence within the Commonwealth for the Federation means that, in Trinidad, it is desirable to prepare the ground now for the changes which will be necessary

by that time (594 H.C. Deb. 18-22, November 3, 1958; Commonwealth Survey, C.O.I., November 11, 1958).

Report. The Colonial Report, 1955, has been published by the Colonial Office.

Uganda

Constitutional developments. The Governor of Uganda announced on November 17, 1958, that a Committee would be set up: "To consider and to recommend to the Governor the form of direct elections on a common roll for Representative Members of the Legislative Council to be introduced in 1961, the number of representative seats to be filled under the above system, their allocation among different areas of the Protectorate, and the method of ensuring that there will be adequate representation on the Legislative Council for non-Africans" (595 H.C. Deb. 1320-1322, November 20, 1958).

BOOK REVIEWS

LEGAL PERSONALITY AND POLITICAL PLURALISM. Edited by LEICESTER C. WEBB. [Cambridge University Press; The University of Melbourne Press, for the Australian National University. 1958. xvi and 200 pp. £1 10s.]

WHATEVER is the province of history or geography, law is about gaps, created by the uncertainties or conceptual poverty of a system; and lawyers are always ready to peep into the breach, before an admiring audience of sociologists, logicians and clients. Into one niche, many systems have stuck the artificial legal person, whose doctrine has had its high priests, heretics and martyrs. Colonists bore the old faiths and the old schisms on their voyages from Europe, and now come these meditations, on the presence, essence and attributes of the legal person, from the remoteness of a Canberra seminar.

Professor Webb contributes a useful, modestly written introduction, and two essays on the political pluralists. He shows the reaction of these philosophers, inspired by Maitland's exposition of Gierke's realism in theory of the place of groups in society, to the famous cases on the law of associations at the turn of the century, pointing out that their attitudes might often seem irrelevant to lawyers. In his second essay, he traces some developments from the earlier pluralist position, hard to reconcile with the great dictators and the march of time. The notion, popular in the era of the New Deal, that State and law existed to balance group interests, while the richer got poorer and the poor got what they deserved, had been succeeded by the denial of the possibility of a purely political act. Professor Webb quotes Mr. Pendleton Herring: "Men find their interest in the political process, and their civil behaviour is determined by their connections with churches, labour unions, business associations, fraternal organisations, and so on." (One can sympathise with Mr. Herring's unwillingness to continue the list.) Now admittedly a lot of political behaviour is really the self-seeking of the white collars, the blue collars, or even organised no-neck monsters—but is this all? Mr. D. Pike's essay *Churches and the Modern State* is a plea for their separation and co-operation. He describes some of the bitter quarrels on Church government in Australia, ending on a note of quiet confidence for the future. His vision of the work of a Church is that of Figgis, and more recently of M. Maritain. Mr. R. M. Martin provides an analysis of English case-law on the personality of trade unions, and of its repercussions on the alien structure of Australian labour relations.

Professor Derham explains clearly and enthusiastically the methods of legal analysis advocated by Professor H. L. A. Hart, showing how it can clarify those questions of policy the existence of which no analytical jurist would deny. His conclusions are impliedly doubted by Professor Sawyer and Dr. Stoljar, however, the former declaring that: "It is necessary to carry the discussion of conceptions of corporate personality beyond the point at which the neo-Kantians and linguistic philosophers usually leave it." Professor Sawyer (*Government as Personalised Legal Entity*) writes in a practical spirit, but his conclusions are disappointing: "Judges who think of government and its offshoots as morally responsible persons may at least find it worthwhile to scold these persons; if they think in terms of 'legal entities' the result may be a formalism devoid of moral standards or even of common sense." With respect, Professor Sawyer might explain his confidence in the moral judgment of a man who shirks the effort of treating even his own subject rationally.

Dr. Stoljar, in two stimulating essays (*The Corporate Theories of Frederick William Maitland; The Internal Affairs of Associations*) seems to renew a recent attack on Hart's view of definition and theory in jurisprudence. He urges instead an examination of the kinds of rule used to get control of the acts or the financial "kitty" of people acting in a group. The reviewer suggests that these learned essays should be read with the discussion between Professor Cohen and Professor Hart in the Proceedings of the Aristotelian Society.

These problems, fundamental to legal and political theory, are presented in a readable setting that adds weight to Professor Sawyer's requirement that a lawyer must be able to spot what is at stake when any theory is advanced. The Introduction concedes that the book may have "omissions and disproportions of treatment." Could room have been made for a brief philosophical account of groups and bodies, before even Professor Derham's admirable opening essay? And could not Professor Webb have dealt with the Communist Party Dissolution Act—though admittedly his own monograph on the subject does not seem to mention the pluralist philosophers?

The contributors are not dogmatic, of course, and where the reviewer has dissented, the spirit is that of the suddenly voiced doubt at any seminar: "But Professor, surely. . . ." Other readers ought to get a similar impulse, sharing the regret that they cannot expect an answer.

"Joan Robertson" should presumably be "Joan Robinson" at p. 183; and were the rest of his essay like one paragraph on p. 146, Mr. Pike should be James Joyce.

D. J. BENTLEY.

TASK FOR GIANTS—AN EXPANDING COMMONWEALTH. By THE HON. PATRICK MAITLAND, M.P. [Longmans Green & Co. 327 pp. 42s.]

THE author of this book would wish to be judged primarily on his political theme, that, in the words of the Commonwealth Prime Ministers in 1951, "the Commonwealth countries do not regard themselves as some sort of exclusive body." Rather, it is the answer to the call for "broader patriotisms"—the answer for those who "fear the Communist bloc" and for "those that admire and respect the United States, but discern a terrible rigidity in her constitutional structure." Many historians, constitutional lawyers, students of international affairs who would not necessarily accept the conclusions of the book will, however, find it valuable.

Part I is an accurate and skilfully condensed survey of the growth of responsible government in the Commonwealth, the background to the Statute of Westminster, the significance of that Act, the equally significant decision of 1949 to accept India as a Republic within the Commonwealth, and the multifarious and continuously operating contacts between Commonwealth members—"an exchange of many thousands of words of cipher every year"—as well as numerous meetings from those of Prime Ministers or Finance Ministers downwards. Ties of citizenship, freedom of movement and similar parliamentary systems are well analysed. The author perhaps is too optimistic that South Africa shares all these common values and he also passes over too lightly the lapses from the rule of law in certain territories.

Part II attempts the more difficult task of examining the "One Theme" which unites the Commonwealth. Here is one of the best factual accounts of the machinery of consultation, communication, economic co-operation and, especially, defence arrangements available in short compass. There are doubts again, however. Does not the author appear too optimistic that the Commonwealth can continue united in the face of Suez and Middle Eastern problems? Even more—that other countries, even the Sudan, let alone Iraq, may seek membership?

Part III examines the "World Role" of the Commonwealth. There is, the author holds, "something recognisable as a Commonwealth approach to foreign policy." The Commonwealth produces "a Third Force diplomacy" or "a Third Interest in a Second Force in the Free World." There are tensions, notably in Kashmir, Pakistan and Cyprus. But optimism again sees "standards, conscience and responsibility" as solving these—and even widening the circle. Chapter VII, which the author recommends impatient readers to tackle first, cannot be summarised. It deals with planned migration and the "generation of capital." At this point it becomes clear that the author's proposals stand or fall by the possibility of integrating Western Europe into the Commonwealth system.

To expand the Commonwealth, in which "the civilised nations may find their home and peace, backward peoples their hopes and their purpose" is Patrick Maitland's Task for Giants. Many will remain unconvinced of the possibility of achieving his aims; others may consider them undesirable. None could fail to be interested, indeed aroused, by the well argued case presented in this book.

H. V. WISEMAN.

BASU'S COMMENTARY ON THE CONSTITUTION OF INDIA. Vols. I and II. Third Edition. [S. C. Sarkar & Sons, Ltd. 1955-56. Vol. I. lvi and 875 pp. Vol. II. lvi and 847 pp. £6.]

BASU'S CASES ON THE CONSTITUTION OF INDIA. Vol. II (1952-54). [S. C. Sarkar & Sons (Private), Ltd. 1956. xvii and 636 pp. Rs. 22.]

SHORTER CONSTITUTION OF INDIA. By DURGA DAS BASU. [S. C. Sarkar & Sons (Private), Ltd. 1958. 1 and 624 pp. £2 5s.]

MR. D. D. BASU'S massive *Commentary on the Constitution of India* has already earned world-wide recognition, and it ought to be on the shelves of every good law library. Vast in its first edition, its bounds have been set wider and wider; and the prospects for expansion have become almost infinite, for the author writes in his preface to the third edition that his endeavour has been "to present a treatise on the universal notions of justice and constitutional government." His work does in fact fall far short of this ambitious objective, but it contains a rich store of material on comparative constitutional law which only one of prodigious industry could have collected, sifted and presented.

Apart from a general introduction of some forty pages, the work consists entirely of an annotated commentary on the articles of the Constitution. Each note begins with a recital of (and in some instances a commentary on) analogous provisions of other constitutions. The subsequent notes on the law in India also incorporate a good deal of comparative material. Some of these notes are voluminous; the note on article 19, which deals with the "seven freedoms," runs to over ninety pages. All the relevant Indian cases are discussed, and numerous American, English and Commonwealth decisions are also considered. In the notes to article 118, on parliamentary procedure, one discovers large extracts from Erskine May's *Parliamentary Practice* in a condensed form. In his notes on the Cabinet and constitutional conventions the author has drawn on the writings of most of the leading English authorities. There is relatively little unnecessary repetition, and a sample survey indicates that the quality of the author's summaries and comments is sound. His is a most remarkable achievement.

The second volume of Mr. Basu's *Cases* decided by the Supreme Court maintains the high standard of editorial comment set by the first. These casebooks should be of the greatest value to Indian students. They should also be helpful to comparative lawyers in other countries who do not have

access to the Indian law reports. And in Commonwealth countries like Malaya and Nigeria whose constitutions do or will incorporate justiciable guarantees of fundamental rights the precedents set by the Indian Supreme Court may well come to enjoy strong persuasive authority. For judges and practitioners in those countries Mr. Basu's casebooks may serve as a first introduction to the Indian approach to kindred problems.

The *Shorter Constitution of India* is not, unfortunately, a book that will be particularly useful to readers outside India. It is intended as a book of reference for busy practitioners, and it is essentially an abridgment of the larger *Commentary*; the annotations are on the whole brief, and deal almost exclusively with Indian legislation and case-law. If Mr. Basu ever has any leisure, perhaps he will consider the possibility of writing a book of similar size, but not in the form of an annotated commentary, primarily addressed to readers overseas.

S. A. DE SMITH.

CENTRAL ADMINISTRATION IN BRITAIN. By W. J. M. MACKENZIE and J. W. GROVE. [Longmans Green & Co. 1957. xvi and 487 pp. 30s.]

PROFESSOR MACKENZIE and Mr. Grove, of the University of Manchester, have written a textbook that can sincerely be said to fill a long-felt want. That such a gap in our literature on government should have existed at all is perhaps surprising, but, as the authors point out, the field that they have covered has never been surveyed and presented in a unified way before. Their main object has been "to explain the work of the great central Departments of British Government, and of the various organs that are directly subordinate to them." Their book is elementary in so far as most of the topics covered have already been explored more thoroughly by others in specialised studies, but it is admirably written and it is full of stimulating and well-informed comment. To a very large extent the book is about the Civil Service. Departmental organisation and functions are not treated exhaustively; instead, six individual Departments are examined. The Cabinet hardly puts in an appearance until the nineteenth chapter, and is then disposed of rather cursorily. But although criticism may be levelled at the balance of the work, there can be nothing but praise for the degree in which it has combined comprehensiveness with accuracy and readability. This is a first-rate textbook, and there is not the slightest doubt that it will be extremely popular with university students of politics and public administration, not least because of its very moderate price.

S. A. DE SMITH.

PUBLIC LAW

Summer, 1959

COMMENT

OCCASIONALLY, a particular judicial decision is at once recognised as setting a new pattern, shifting some basic relationship, giving an earth tremor after which none of the existing structure is ever quite the same. When the idea of the Restrictive Practices Court was discussed, it was criticised in two ways which were barely reconcilable. One was that the Court was the wrong body to make decisions having important extra-legal consequences. The other was that the Court would be cumbersome and ineffective. The judgment in *Re Yarn Spinners' Agreement* may prove to be of great significance in legal history and perhaps, though this is much less clear, in social, political and economic history also; it gives meaning to the Court which, in this sense, is by it justified. Whether such a decision ought properly to be taken by such a body is a question of opinion not of proof.

The Registrar of Restrictive Trading Agreements referred to the Court this agreement made between the members of the Yarn Spinners' Association, and the Association was made sole respondent to the proceedings on behalf of all its members. The agreement provided for a minimum price scheme and standard conditions of sale, the prices and details of which were fixed by resolutions, and bound the members of the Association not to sell yarn containing 85 per cent. or more of cotton at a price lower than that fixed under the rules. The Restrictive Trade Practices Act, 1956, placed on the Association the burden of showing that this restriction was not contrary to the public interest in accordance with the terms of section 21 (1) of the Act.

The members of the Court were Devlin J. (president), Upjohn J., Pearson J., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace and Mr. W. G. Campbell. The judgment (from which the following account is taken) was read by the president.

The spinners, who are the members of the Association, form a section of the Lancashire cotton industry. The spinning industry is concentrated in a small area about thirty-five by twenty-five miles in extent, comprising some 225 concerns which employ over 100,000

operatives. The spinners buy imported raw cotton and, of the yarn which they spin, about a quarter passes into the hands of doublers for the production of stronger yarn. Of all the yarn spun, 70 per cent. goes to the weavers, about 5 per cent. is exported, and the remaining 25 per cent. is used for a great variety of different purposes. The weavers manufacture grey cloth which is passed on to the merchant converters who sell the finished cloth to garment makers or wholesalers.

The prosperity of the cotton industry was built on a vast export trade which until 1914 was expanding. But whereas in 1912 the amount exported was 85 per cent., today this has fallen to 25 per cent. because of competition from India, Pakistan, Japan and Hong Kong. The production of cotton yarn has been much reduced. During the last war and until 1949 prices were fixed while the industry was under government control and when, in April 1949, price control was removed, the Association asked its members to treat the fixed prices as minimum prices and so this agreement came into being. At first, as clothes rationing ended, there was a boom which reached its peak early in 1951, followed by a severe recession in 1952; trade improved until another recession in 1955; apart from a short period of revival during the Suez crisis, the recession continued and is now comparable with that of 1952.

Under the agreement, the minimum price is an artificial figure calculated on a hypothetical average cost. The scheme is designed to guard against cut-throat competition as happened in and after 1929-31 and is based on the theory that the spinning industry is one in which there occur from time to time short but violent recessions. During these recessions, it is argued, if there were no fixed minimum prices, the weakest firms would go out of business permanently, and in the long run the public interest would suffer, as, when normal demand returned, the industry would be unable to meet it. The Court disagreed with this diagnosis and remedy. "If what is meant by a recession is that the demand is not sufficient to push the price off the minimum" said the Court, then the recession in this industry is not exceptional; nor did the minimum price scheme operate simply to prevent cut-throat competition and selling below cost when demand was exceptionally poor. "One way or another the minimum price appears to insure a reasonable return all the time to the majority of spinners. . . . We are satisfied that since 1951 on the average the prices obtained for yarn have been higher than they would have been in a free market. Everyone agrees that spinning is a contracting industry; therefore reductions in capacity ought broadly to match the falling demand and high-cost producers ought to be closing down. The scheme has not altogether prevented

the natural process but it has seriously retarded it. . . . We are satisfied that the industry can and ought to be made smaller and more compact."

These statements by the Court were, however, only the general conclusions. By the terms of the Act, the scheme was *prima facie* contrary to the public interest and the Court had to declare it to be so unless the Association could prove the existence of circumstances defined in one or other of the seven categories in section 21. The Association relied finally on categories (b) and (e).

Under category (b) the Court had to be satisfied that the removal of the restriction would deny to the public, as purchasers, consumers or users of any goods, specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such. The Association argued that there were several heads of benefit. These were: first, a sufficient preservation of the processing capacity and labour force, which was valuable in meeting fluctuations in demand, providing variety of goods for the shopping public, and in times of national emergency or when particular sources of supply were scarce; secondly, enabling and encouraging the industry to spend money on modernisation, thus enabling the public to obtain cheaper or better goods; thirdly, the prevention of "price invasion"; fourthly, enabling and encouraging spinners to spin for stock in bad times, so that when demand revives there is stock immediately available to fulfil it; fifthly, the channelling of competition into the maintenance and improvement of quality and service; sixthly, preventing the establishment of monopoly or near-monopoly conditions; seventhly, price stabilisation; and eighthly, certain benefits derived by the purchasers of yarn. The Court gave its reasons which, in the main, followed from its general conclusions, for rejecting all these alleged benefits.

Under category (e) the Court had to be satisfied that having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area or areas in which a substantial proportion of the trade or industry was situated. Under this provision, the Association could, for the purposes of its argument, select any areas as examples. It selected eleven areas in which about 100,000 employees or about 70 per cent. of the industry were situated and, alternatively, four out of the eleven in which about 55,000 or about 38 per cent. were situated. Making certain assumptions, the Court concluded that the effect of ending the scheme would be to raise the general level of employment in the eleven areas from 4.3 per cent. to 5.9 per cent and, in the four areas, from 5.2 per cent. to 7.8 per cent. The Court found, therefore, that there

would be a serious adverse effect on unemployment and, with doubt and hesitation, that that effect would be persistent.

Against this conclusion under category (e), the Court considered the detriments of the scheme to the public relied on by the registrar. They were three: first, the maintenance of a high price for yarn eventually reflected in the price of goods bought by the public—the Court felt that the price of yarn could be lower, with appreciable, though not great, benefit to the public; secondly, the loss of or handicap to the export trade—the Court was satisfied that there was an appreciable loss which must be a public detriment; thirdly, the waste of national resources caused by excess capacity—the Court found this to be a public detriment.

Finally, the Court set these detriments against the effect on the general level of unemployment. The Court concluded that the effect was localised whereas the price of its avoidance had to be paid nationally, particularly by the waste of national resources in the form of excess capacity, and decided that on balance it would be unreasonable to continue the restrictions in the scheme in order to avoid the degree of local unemployment. The Court declared the agreement to be contrary to the public interest.

The judgment of the Court is a political judgment. It is political because it is founded on an Act of Parliament which enshrines certain political assumptions more fundamental and more explicit than is common with Acts of Parliament. The Courts have had to do often enough with Acts reflecting party policies. But it is rare in modern times to find a Court, presided over by one of Her Majesty's judges who is supported by two others, required to play the vital decisive part in a piece of political administration. To say this is not to condemn or even to criticise but to notice the novelty. In the course of its judgment the Court made these observations: "We are satisfied that the industry can and ought to be made smaller and more compact. . . . We cannot see why price invasion is a bad thing or something which ought to be prevented; it is only one form of normal trade competition. . . . Competition in quality is no doubt a benefit, but the removal of the restrictions would not prevent it. . . . Even if the industry were reduced to the five large combines, who now control about 40 per cent. of it . . . it would not necessarily diminish competition. . . . If price stability could be obtained without the sacrifice of a free market, it would undoubtedly be a benefit. . . ."

These views are advanced as if they merely set forth platitudinous truisms. But are they all quite so self-evident? It is interesting to speculate—and impossible to determine—what might have been the nature of the analysis and conclusion had the Court been differently composed. The answer might be that the analysis and

conclusion would have been much the same not because the facts logically press to one inevitable finding but because the pattern of analysis and conclusion is laid down in the Act. The Court refers to this: "What we have to consider is whether price stabilisation as an alternative to a free market is a benefit to the purchasing public in the circumstances of this particular case. We cannot think that as a general rule it is a benefit; if we were to hold that, we would be going contrary to the general presumption embodied in the Act that price restrictions are contrary to the public interest." It is a comforting theory that the Act has made articulate the major premises. But it is not altogether and in all the circumstances of this case wholly convincing.

At the end of its judgment, the Court recognises that its decision might come "at an unfortunate time while . . . the general level of unemployment has been rising" and that "any unemployment may cause great hardship to those who suffer from it." There follow these somewhat surprising words: "But we are clear that once we have reached a conclusion of fact, it is our duty to disregard the consequences of our findings." The "fact" presumably is that the public interest is better served by the ending of this agreement than by its continuance. But the level of unemployment is accepted by the Court and by the Act as relevant to this conclusion of fact.

In one scale are placed various weights representing the public interest; in the other scale are placed various weights representing, principally, unemployment. The Court determines how heavy these weights shall be and so how the scale will tilt. Having taken this political decision, it ought not to run away from the consequences which flow from and are indeed involved in it. Politicians cannot run away from them.

WAIVER OF METROPOLITAN BY-LAWS—A CASE-NOTE

The recent case of *Townsend (Builders), Ltd. v. Cinema News and Property Management, Ltd.*,¹ raised a number of difficult problems on some of which the reported judgments are of limited assistance. Both reports are, however, clear on the central feature of the case, and the *ratio decidendi* of the Court of Appeal appears to be that a local sanitary authority, *i.e.*, a metropolitan borough council, has power to relax the requirements of a by-law made by the L.C.C. Other aspects of the case merit discussion, but it is the *ratio* and the manner in which it was reached that call for immediate comment.

The facts were that the plaintiff had contracted to carry out

¹ [1959] 1 W.L.R. 119; [1959] 1 All E.R.; it is not intended that the case shall be reported in the Law Reports.

work on the defendant's premises in accordance with specifications drawn up by an architect, Wilkie. He also undertook to comply with and give all notices required by any Act of Parliament or any by-law or regulation. The notice which should have been served on the local sanitary authority by the builder, in accordance with the London County Council Water-Closets By-Laws had not been served. Shortly after the work was finished, the local authority, Chelsea Borough Council, complained that the work was not in accordance with the by-laws, but agreed not to enforce compliance when a director of the company (the occupier of the building) gave an undertaking that he would comply when the circumstances for which this concession was made no longer existed. The defendant refused to pay the builder's account on the ground that the contract was illegal or had been illegally performed, and counterclaimed for the cost of restoring the building to its original condition. Both parties sued the architect in third-party proceedings, the defendant for negligence and Townsend for an indemnity.

It should be observed that the illegality was nothing more heinous than that two combined bathroom/w.c.'s could be approached directly from bedrooms. A partition enclosing the w.c. would, as the local authority pointed out, remove this taint of illegality.

The Court of Appeal held that, by waiving strict compliance with the terms of the by-law, the local authority had legalised the builder's work and that the defence of illegality failed. The striking feature of the case was that no authority was cited to or discussed by the court on the question whether any local authority has power to waive the requirements of by-laws. This in itself is surprising, but it is even more surprising to see the assumption made that a metropolitan borough can waive compliance with L.C.C. by-laws. It will be submitted that in this particular case neither the L.C.C. nor Chelsea Borough Council had power to relax the requirements of the L.C.C. Water-Closets By-Laws. Even if they had, some indication from the court of the source of the power might have been expected, but the only reported indication that the court addressed their minds to the problem is in the judgment of Lord Evershed M.R. who merely said: "The local authority felt it to be within their power (and no doubt rightly) to relax, or not strictly to enforce, the by-law."²

The Court of Appeal held in 1929 that a local authority has no power to waive the requirements of by-laws in any particular case: *Wm. Bean and Sons, Ltd. v. Flaxton R. D. C.*³ The decisions in

² [1959] 1 W.L.R. at p. 125; [1959] 1 All E.R. at p. 13.

³ [1929] 1 K.B. 450.

*Yabbicom v. King*⁴ and *McIntosh v. Pontypridd Improvements Co.*⁵ were followed on this point. All these cases related to building by-laws, and it was felt desirable to introduce power to relax building by-laws shortly after the *Bean v. Flaxton* decision. At any rate, the London Building Act Amendment Act, 1935, s. 9, introduced this power in respect of by-laws made or having effect under that Act; the Public Health Act, 1936, s. 63, introduced the power in respect of building by-laws. The purpose of these two powers would appear to be the same, but, as will be shown, the power in London is considerably narrower than elsewhere.

The building and public health legislation of London is contained in two different series of statutes. The sanitary conveniences of buildings could come under both heads but the power to make by-laws applicable to them is contained in the public health legislation. For this reason it is essential to consider the precise extent of the dispensing power conferred by the London Building Act Amendment Act, 1935, s. 9: "(i) The Council (*i.e.*, the L. C. C.) may on receipt of an application in relation to any particular building or structure modify or waive upon and subject to such terms and conditions (if any) as they think fit any of the requirements of any by-law made or having effect as if made under this Act." This is the only dispensing power applicable to London's building by-laws, and, consequently, by-laws made under the public health legislation, even if they do relate to building, are not subject to this power. The by-laws in the *Townsend* case were made under the Public Health (London) Act, 1891, s. 39, and given effect as if made under the Public Health (London) Act, 1936, by section 307 (1). It would, therefore, seem clear that there is no dispensing power in respect of those by-laws; the decision in *Bean v. Flaxton* would apply. It should also be emphasised that in the statute no metropolitan borough is given a dispensing power.

There is no power in London or elsewhere for a local authority to relax the requirements of its public health by-laws. The absence of a dispensing power in matters of building sanitation might therefore appear deliberate. The public health requirements of buildings are of such paramount importance that, although water-closets are in buildings, it might have been felt they should be left outside the dispensing power applicable to building generally. But outside London the by-laws applicable to water-closets in buildings are within the definition of building by-laws and can be waived with the Minister's consent.⁶ This result is reached by deliberate drafting in the

⁴ [1899] 1 Q.B. 444.

⁵ (1892) 8 T.L.R. 203.

⁶ See Public Health Act, 1936, s. 63, set out at p. 112 below.

Public Health Act, 1936. It is noteworthy that that statute deals with both public health and buildings, whereas the London legislation creates a cleavage between the two.

The relevant provisions of the Public Health Act, 1936, are as follows: "63. Where a local authority consider that the application of any building by-law in force in their district would be unreasonable in relation to any particular case, they may with the consent of the Minister relax the requirements of the by-law or dispense with compliance therewith"; "343.—(1) . . . 'building by-laws' means by-laws made under Part II of this Act with respect to buildings, works and fittings . . ."; the power to make by-laws in respect of buildings, works and fittings is conferred by section 61 (1) which covers by para. (ii) (d) "sanitary conveniences in connection with buildings," together, of course, with other matters of sanitation. In this Act it is clear that the sanitation of buildings is a building matter, whereas in London it is a public health matter as far as dispensations are concerned. Is there some metropolitan requirement of public policy which insists that London's water-closets conform with the by-laws notwithstanding a benevolent dispensing power throughout the rest of England and Wales? Or is this the product of an over-rigid demarcation between building and public health which the legislature have inflicted upon London?

A further difficulty in the case arises from the award of damages against the plaintiff on the defendant's counterclaim. It was pointed out by Lord Evershed M.R. that a partition separating the bathroom from the w.c. would affect compliance with the by-laws and the cost of erecting such a partition was the measure of damages on the counterclaim.⁷ In other words, the bathroom/w.c. had still to comply with the by-laws. The builder's obligation to comply with the by-laws was, *vis-à-vis* the defendant, based on an express term in his contract, and also, it is submitted, he was still obliged to conform with their requirements *vis-à-vis* the local authority. The local authority had granted a temporary concession which amounted to a waiver in the judgments of the court. But it is quite clear that there was no intention to grant a dispensation even if the local authority had power to grant one: the waiver or relaxation was for a limited period only. In other words, the local authority still held that the work failed to meet the requirements of the by-laws but granted a period of grace during which they would permit the use of the adjoining rooms without insisting on a partition.⁸ It seems, with respect, an extreme view of this situation to hold that the local authority had by a waiver or dispensation legalised the builder's

⁷ Not reported on this point in [1959] 1 W.L.R. 119.

⁸ See the reports at pp. 10 and 121 respectively.

activity. It is submitted that on these facts an undertaking not to prosecute within a specified period if the illegality was then rectified fell far short in itself of legalising the builder's work: the only way of achieving this was by doing the further work and thereby rectifying the illegality.

The construction of the by-laws was a task of no small difficulty on which the Court of Appeal took a view different from that of the trial judge. It seems from the reports of the case that the court acted on the assumption, without making it part of their decision, that the work done was illegal but for the waiver. It would be interesting to see whether in the absence of a waiver the court would have decided that the work was illegal. On the facts of the *Townsend* case the plaintiff was bound by his contract to work to the architect's specifications and to comply with the by-laws. The court decided, apparently, that the builder must do work additional to that specified in order to perform his contract: he had to pay for the partition which was necessary. Was the incomplete work illegal? On the facts of this case, it would appear to be so. Since it was the builder's contractual duty to do all the work necessary to comply with the by-laws, he was clearly aware that his work was the complete job; no further work was envisaged.

But if the builder had contracted merely to carry out the specifications, it might be argued that the work that remained necessary to comply with the by-laws was no concern of his. It would depend on the construction of the by-laws whether he would remain liable in this event for breach of their requirements. The London by-laws are, of course, silent on the question whether he can safely leave the remainder of the work to his customer.⁹ May he assume without inquiry that the customer will erect a partition himself or employ someone else, *e.g.*, a carpenter, to do it for him? And if the builder may not safely assume this, is his work illegal if he accepts the customer's assurance that the partition will be erected? These questions can be answered only by construing each set of by-laws, but it is to be hoped that the builder commits no offence in the second of these situations.

Finally the case decided that the builder was entitled to an indemnity from the architect for the cost of the partition.¹⁰ The builder was liable to pay for this *vis-à-vis* the customer, notwithstanding a custom in the trade that it was the architect's responsibility to see that the work complied with the by-laws. The custom is not set out in detail in the report, and we are not told whether

⁹ They provide that "a builder constructing a water-closet . . . shall comply with the following requirements" and then lay down certain requirements.

¹⁰ Not reported on this point in [1959] 1 W.L.R. 119.

this responsibility is owed to the client, the builder or both. It is understandable that the term in the contract between builder and customer should render the builder liable for failure to comply with the by-laws whatever trade customs there might be. But we are not told whether this custom creates an implied contractual duty for the architect to indemnify the builder. In the absence of such an implied contract, or an express indemnity given by the architect to the builder, it is by no means clear how the architect's liability arose. It is a pity that the reports of the case give no indication of the source of this liability, since in the absence of a contractual liability it would seem that the decision of the Court of Appeal in *Candler v. Crane, Christmas & Co.*¹¹ is squarely in the way of any liability in tort. The case cannot safely be treated as an exception to the principle of that decision, but at the same time one may fairly protest that the report should make clear the grounds of the decision. What does emerge from the *Weekly Law Report* is that *Candler v. Crane, Christmas* was cited; judgment on the builder's indemnity from the architect is not there reported, and so we do not see how, if at all, the Court of Appeal dealt with that case. In the *All England Report* the judgment on that point is reported only in the result, and we are not told that *Candler v. Crane, Christmas* was cited. All in all, the combined reports are sadly deficient on this aspect of the case, and consequently we do not know whether the case is of any significance on this point or not. It may even be that the judgments themselves are equally deficient on this point, but, whatever the reason for our ignorance, it is not unreasonable to complain.

DONALD THOMPSON

¹¹ [1951] 2 K.B. 154, C.A. It is perhaps noteworthy that Lord Cohen, who was a member of the Court of Appeal in the *Townsend* case, was as Cohen L.J. one of the majority of the court in this decision.

THE DANISH PARLIAMENTARY COMMISSIONER IN ACTION

I. M. PEDERSEN

IN an article published in the autumn number 1958¹ of this periodical the Danish Parliamentary Commissioner Professor Stephan Hurwitz has described the functions of his recently established office, one of the most interesting recent developments in Danish administrative law. He has powers to supervise the Ministers, the civil servants and all other persons acting in the service of the State (including the army). Although he is elected by Parliament and acts on its behalf his office is, in itself, not political. Article 3 of the Directives laid down by Parliament provides that he is to "keep himself informed as to whether any person within his jurisdiction pursues unlawful ends, takes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties." The Commissioner has not, however, powers to alter the decisions made by administrative authorities. His main functions are to investigate, to state his opinion and to report to Parliament.

When the question of appointing a Parliamentary Commissioner was first discussed in connection with the proposed amendments to the Danish constitution, passed by Parliament in 1953, a great number of civil servants were opposed to the scheme. One of the main reasons was that it was feared that the proposed control by the Commissioner would tend to make civil servants afraid of taking responsibility without being protected by written rules. This, it was argued, would result in less flexibility—to the disadvantage of the public as well as the civil servants themselves.

Though the Commissioner has only been functioning for less than four years most people agree that those fears have been proved unfounded.

On the other hand, a number of different problems must inevitably arise when a new system of control is established. It is still too early to predict how the Commissioner's work will affect the Danish administrative system in the long run, but even at this early stage it may be of some interest to study in detail how the control has

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¹ [1958] P.L. 236-245.

worked in practice until now. This is the purpose of the present article which has been written from the point of view of one of the many civil servants whose duty it is to make some small section of the administrative machinery work effectively and at the same time in accordance with the principles of administrative law.

Any discussion of the Commissioner's work must naturally take his annual reports as its starting-point, even though it must be kept in mind that he deals with a number of cases besides those reported and even though the informal discussions between the Commissioner's office and the administrative authorities before a case is decided play an important part in the relations between the Commissioner and the administration.

The reports published so far (covering the period April, 1955–December, 1957) contain much material of interest to students of administrative law. The questions discussed are, however, of a very varied nature; it would be impossible to deal with all of them in a short article, which must necessarily be limited to a discussion of the main problems.

The classification of the different types of cases has been made primarily from a legal point of view. It is, however, also of considerable interest to study the influence of the Commissioner's control upon what may be called the more technical aspects of administration, and the cases quoted have for this reason been chosen from as many different fields of administrative work as possible.

1. ADMINISTRATIVE PROCEDURE

It is interesting to notice that quite often when a complaint has been lodged because the applicant was dissatisfied with the exercise of discretionary powers the Commissioner has not only dealt with these problems, but has of his own accord discussed the methods applied by the administrative authorities when dealing with the case—*i.e.*, he has not limited his investigation to the question whether the decision itself was *ultra vires* but he has given his opinion of the procedure applied by the authority in question—its methods in the widest sense of the word, or, in some cases, its lack of methods.

In Danish statute law there are comparatively few rules governing administrative procedure, and in Ministries and other institutions organised in the same way (in contrast to administrative tribunals) it is unusual to find written directives laying down rules to be followed by the personnel—such as is very often the case in Sweden. Consequently the decisions in this field are of considerable interest both to civil servants and to the public.

(a) Insufficient evidence

Report 1956—case no. 5: Held that the Industrial Injuries Directorate, before deciding a case, ought to have written for a medical certificate referred to in one of the documents of the file.

(b) Non-discovery of documents

1957–68: In a case where a former National Service man was claiming damages from the Ministry of Defence the Commissioner held that the Treasury Counsel ought to have disclosed all documents in the file with the exception of his correspondence with the Ministry, including the letter in which he had stated his opinion of the legal problems of the case.

(c) Failure to make the claimant acquainted with additional evidence and to give him sufficient opportunity to argue the case

1956–13: The Central Tax Appeals Tribunal had, before deciding a case, put it before one of the lower taxation authorities, which in its answer gave some additional information about the case. The Tribunal decided the case without putting this letter before the applicant. This—which was contrary to the Directives governing the procedure of the Tribunal—was criticised by the Commissioner.

1957–30: The Commissioner criticised a taxation board which had decided a case to the disadvantage of the applicant without giving him an opportunity to argue the case. The behaviour of the Board was contrary to the State Taxation Act.

1957–35: The Emigration Office ought to have informed an employer about the complaints of a young foreign girl working with him as a “stagiaire” before allowing her to take up a job as stagiaire with another employer.

(d) Possibility of bias

1955–19: Free legal aid in first instance law suits is normally granted by the permanent head of the County administration (amtmanden). He may, if he thinks it necessary, always send an application to the Ministry of Justice to be decided there. The Commissioner held that an application for free legal aid in a case against the County ought not to have been refused by the County authorities but should have been sent to the Ministry.

1957–8: The Commissioner asked the Minister of Finance to consider a change in the taxation legislation to avoid the situation where some taxation officials were members of appellate bodies hearing cases which these officials had themselves decided at first instance.

1957-14: Similar case about the Labour Council.² The Head of the Labour Directorate is chairman of the Labour Council even when the Council is deciding appeals from his own decisions. The Ministry stressed that the present system had great advantages from a practical point of view. The Commissioner asked the Minister to consider the introduction of a new system under which the Head was to be entitled to be present at the sittings of the Council but not when a vote was taken. The Commissioner added that he considered it desirable that a lawyer acquainted with procedure in ordinary courts should act as chairman when the Council was sitting as an appellate body.

(e) Qualifications of officials making decisions

1956-80: An applicant had been granted a building loan by the Ministry of Housing. The loan was to cover the architect's fee for a plan formerly sent to the Ministry. Later the case was brought before the Ministry again, and it was discovered that it was contrary to the practice of the Ministry to cover such a fee. The loan was, therefore, reduced with the amount of the fee. This decision was made by a civil servant not in the administrative class. The Commissioner held that such decisions ought to be made by members of the administrative class.

1956-66: The investigation by the Commissioner of a complaint about the temporary withdrawal of a driving licence (the applicant was accused of driving while under the influence of drink) resulted in an order from the Police Director of Copenhagen enjoining that decisions to restore licences must only be taken by heads of police stations or their deputies.

(f) Failure to give sufficient information about the state of the case, while it is still pending

1955-37: Some letters from a diver to the Ministry of Trade were sent to the Divers' Union. Held that the diver ought to have been informed about this.

1956-22: A person who had sent an application to the Ministry of Finance (dealing with a question of duty on imported goods) obtained a personal conference with the Minister. After the conference he wrote a letter to the Minister in which he stated that relying on an alleged promise from the Minister he intended to start buying some specified goods abroad. The Minister remembered clearly that he had given no such promise, and as the application was still being dealt with in the Ministry it was not considered

² Deals with questions of unemployment insurance and labour exchanges.

necessary to answer the letter until the final decision was to be given. The Commissioner held that the applicant ought to have been informed that the Minister was of opinion that no such promise had been given. The Minister did not, however, agree with him and maintained that the Ministry had acted correctly. The Commissioner's last letter to the Minister shows that he does not think that administrative authorities have a *general* duty to correct wrong statements in letters addressed to them. But he points out that there was a possibility that the applicant *might* have misunderstood the Minister during the conference and that such misunderstanding might have led to financial loss for the applicant.

1956-56: Held that the Customs Department ought to have informed an applicant that the reason why he had as yet had no answer to his application was that the department was reconsidering the rules in question and did not consider it right to issue further licences until a new general policy had been decided.

1957-24: Held that an applicant ought to have been informed that the reason for a delay was that the Ministry of Trade was preparing new legislation upon the subject in question.

(g) Reasons for the decision not stated sufficiently clearly

1955-36: A workman complained that the industrial injuries pension awarded to him was lower than that awarded to another applicant in a similar case. The Industrial Injuries Directorate made a renewed investigation and consulted the Industrial Injuries Council, putting both cases before it for comparison. Both authorities agreed that the decision made by the Directorate was correct. The Directorate, therefore, told the applicant that there were no grounds for awarding him a higher pension, but did not inform him that the two cases had been carefully compared and that the Council was of the same opinion as the Directorate. The Commissioner held that the applicant ought to have been informed of this.

(h) Failure to give information of right of appeal.

1956-6: An unsuccessful applicant sent a letter protesting against a decision to the Industrial Injuries Directorate. The Directorate did not answer the letter. The Commissioner held that the letter ought to have been regarded as a request for an appeal and have been forwarded to the Ministry of Social Affairs as the appellate institution. At all events the applicant ought to have been informed that there was a right of appeal to the Ministry.

1956-19: Held that the Labour Directorate ought to inform claimants that there is a right of appeal to the Ministry of Social Affairs, when the decisions of the Labour Council are not unanimous.

1957-80: Held that a Police Master (Chief Constable) ought to inform applicants for taxi-drivers' licences that refusal to grant such licences may, in certain circumstances, be brought before the courts.

(i) Unnecessary delay

Even a cursory study of the Commissioner's reports shows that he is very strongly of opinion that cases brought before the administration ought to be decided without any unnecessary delay. A considerable number of the cases deal with this problem. In case 1957-53 the Commissioner stressed the importance of establishing general measures of control to ensure that the cases were dealt with as quickly as possible. His criticisms are not merely destructive; in 1956-72 and 1956-81 he proposed general changes to lessen the average time spent in dealing with the cases in question.

Quite a number of complaints have been brought against the Central Tax Appeals Tribunal which is very often criticised in the press for being very slow. The Commissioner has investigated its procedure thoroughly; some changes have been made after these investigations.

(j) Other cases

1956-14: A municipal council did not wish to guarantee a building loan granted by the Ministry of Housing to the extent applied for by the claimant. The applicant put the matter before the Ministry of the Interior (and Local Government). The Ministry of Housing was consulted and answered that the point in dispute—the extent of the guarantee—was a case to be settled by the courts. Actually the Ministry was of opinion that the attitude of the Council was contrary to the Act regulating these public building loans. The Commissioner stated as his opinion that the Ministry ought to have expressed this opinion in its answer to the Ministry of the Interior—if not before, when answering a letter from the applicant about the loan.

1956-23: In Denmark the award of unemployment benefits is administered by the unemployment insurance sections of the trade unions. There is a right of appeal to the Labour Directorate and the Labour Council. Appeal decisions are, however, communicated to the appellants by the unions, not by the appellate bodies. The Commissioner pointed out that the general principle—which is laid down in a circular issued by the Prime Minister's department—is that decisions made by Ministries or appellate bodies must be communicated directly to the applicants.

Few of the above-mentioned cases deal with infringements of statute law—they lay down what may be called rules of natural

justice within the field of administrative law. This is not astonishing as Danish Administrative law has never considered administrative authorities free to act without any restrictions within the limits drawn by statute law. Neither have the courts restricted their control to decisions violating written law.

What is remarkable is that a great number of the errors criticised are matters that would never have been brought before an ordinary court.

It is, for instance, quite clear that no court would ever take any action if it found that an administrative body had spent a quite unreasonable time before deciding a case brought before it. Neither would it declare a decision invalid because an official in an inferior position had decided a case that, in the judge's opinion, ought to have been dealt with by a civil servant in the administrative class. And if, in a case where damages were claimed against the State, the court was of opinion that the administrative decision was correct, but that the lawsuit might have been avoided if the department had stated its reasons for the decision in detail at an early stage of the proceedings, this would not entitle the plaintiff to succeed—not even in getting an award of costs against the State.

Neither will a court be able to do anything if administrative decisions are communicated to applicants in an unorthodox manner or if administrative authorities do not answer letters asking for information of what is happening in a case.

Administrative courts—*e.g.*, the Conseil d'État in France—would roughly speaking be in the same position as the ordinary courts when faced with this sort of problem—that is to say that they would be unable to do anything except now and then to comment unfavourably upon the administrative practice. But it is unlikely that many people would start legal proceedings with nothing greater to hope for than this remote possibility.

Although such problems cannot be solved by litigation they are not always unimportant. Indeed, they may often be of the greatest importance to applicants. Quite often it is very difficult for them to grasp the principles behind the exercise of discretion especially if the subject is complicated and highly technical. In such circumstances a quick answer and a politely worded letter giving detailed reasons for the decision may not reconcile an applicant to an adverse decision, but it may lessen his irritation considerably and convince him that his case has been given careful attention. And as conditions of modern life seem to necessitate an ever-expanding administration it becomes increasingly important to establish good relations between officials and the public.

Administrative authorities are, however, not blind to these problems. When studying the cases in the annual reports the reader will get a wrong picture unless he keeps in mind that administrative procedure is governed by many unwritten rules and traditions, and that the general principles laid down by the Commissioner are often already practised in Government departments. But the working conditions of the civil service are such that it may frequently be difficult to say when a generally accepted principle ought to be applied. It would not be to the advantage of the public if civil servants were deterred from using unorthodox methods in situations where such methods are necessary in the interest of applicants—as will often be the case when an applicant can show that there is a real need for an immediate decision. Too many and too inflexible rules will often make the life of the civil servant easier, but they may, at times, make it very difficult for him to serve the public well.

I have dealt in much detail with the errors that cannot be brought before the courts, because this is a new field of control. Some of the cases mentioned in this section (*e.g.*, some of the cases dealt with in subsection (c)) *might* just as well have resulted in a lawsuit. All the same, even in this sort of case, many people prefer to send an application to the Commissioner, because it is easier and quicker, and there is no need whatsoever to be legally represented. But there is another reason for bringing such cases before the Commissioner: no court would like to declare a decision invalid if it is obvious that the error committed has not had and could not have had any influence upon the decision. Neither would a plaintiff claiming damages succeed in such circumstances. The Commissioner, on the other hand, will criticise the administration if he is of opinion that an error has been committed even if it is not of sufficient importance to give the applicant a right to damages or a right to have the decision declared invalid.

The result is that even in this field the establishment of the Commissioner's office has made a more detailed control possible.

2. CONTROL OF THE EXERCISE OF DISCRETIONARY POWERS

In a considerable number of the cases mentioned in section 1 the complaints were lodged because the applicants were dissatisfied with the way the authorities had exercised their discretion. The cases where the Commissioner has actually criticised the exercise of discretion are, however, few and far between, especially when compared with the numerous cases where the methods in dealing with the cases are discussed.

Two of the cases reported in the 1957 report may be of interest in this connection.

1957-45: The Commissioner asked the Minister of Trade to reconsider the decision in an appeal brought before him by an electrician who had applied unsuccessfully for a general permission from the local power station to wire houses for electricity within its district. The power station had refused the permission on the grounds that licences sufficient for the needs of the district had already been issued, and the Ministry upheld this decision as it was of opinion that the power station was entitled to refuse licences for this reason. The question was not dealt with in the Act regulating the matter. The Commissioner did not positively criticise the discretion exercised by the Ministry, but gave it as his opinion that the building activity of the district made the limitation of licences "less well-founded."

1957-49 dealt with an application for a licence to take over a taxi-cab owner's business. The Commissioner held that the police, when deciding which applicant was to obtain the licence, ought not to take into consideration the price offered by the applicants to the former licensee as payment for the business.

A number of the reported cases show that the Commissioner makes a very thorough investigation in case of complaints of abuse of administrative discretion. The reason that comparatively few of the Commissioner's decisions criticise the exercise of discretionary powers cannot, therefore, be sought in a lack of interest in these questions, but in the special problems that those cases present, as shown by the Commissioner in the above-mentioned article.³ It must also be kept in mind that the powers of the Commissioner in this field are not unlimited, cf. section 3 of the Directives.⁴

3. DRAFTING OF ACTS AND STATUTORY INSTRUMENTS. PUBLICATION

In several cases the Commissioner has discussed whether general rules laid down by Ministries ought to be published in accordance with the rules concerning publication of statutory instruments.

In case 1955-48 there was some doubt about the interpretation of a section in a local by-law dealing with health problems. The case was put before the Ministry of the Interior which promised in future to ask local authorities to use a different wording before approving by-laws of the same type.

1956-76: A newspaper alleged that a statutory instrument issued by the Ministry of Agriculture was *ultra vires*. The question had

³ [1958] P.L. 243-244.

⁴ See [1958] P.L. 249.

never been decided by the courts. The Commissioner stated that, in his opinion, the question was doubtful and suggested that the Minister ought to introduce a Bill clarifying the text of the Act in question.

1957-9: An expression in a circular about assistance to the families of National Service men was clarified at the suggestion of the Commissioner.

4. STATUS AND LEGAL RIGHTS OF CIVIL SERVANTS

In view of the fears expressed by many members of the civil service before the Commissioner's office was established it is interesting to see that not a few of the reported cases deal with complaints lodged by civil servants against their superiors and against the conduct of disciplinary investigations.

1956-57: A policeman had been accused of disciplinary offences. The statutory hearing had taken place, but when the record was sent to the Ministry of Justice for the final decision of the case an additional statement about the behaviour of the policeman on a former occasion was added to the file. Although this statement had been without any influence upon the decision of the Ministry the Commissioner held that it ought to have been sent to the legal adviser of the policeman without any request on his part.

In another case⁵ dealing with the rather summary dismissal of an engineer employed by a home for boys the behaviour of the head of the home and the Children's Welfare Inspectorate was criticised. Among other things it was held that the head—who had taken over his job a very short time before—ought not to have dismissed the engineer without giving him previous warning that he would in future have to do better at his job in order to avoid dismissal.

Case 1956-31 deals with a complaint made by a civil engineer employed by the Factory Directorate. He was under notice to quit and during the period before the termination of his service he was one day without previous warning suddenly ordered to leave his job immediately. This was criticised by the Commissioner.

These two cases taken together may, I think, be said to have laid down the principle that actions prejudicial to the interests of civil servants ought not in the normal case to be taken before the offender has been given a fair opportunity to mend his behaviour. But, of course, the misbehaviour may be so serious that the authorities are perfectly justified in taking action at once.

1957-91: Held that the Ministry of Agriculture ought to have made a civil servant acquainted with some letters from the head of

⁵ 1957-48.

the institution where he was employed. In the letters it was alleged that he had committed disciplinary offences, but the Ministry had taken no action against the civil servant and had started no investigation.

The problem in case 1957-27 was of a rather special sort. Two clerks who were out of work had under a relief scheme been given temporary jobs in a State museum. One of their superior officers borrowed money from them. Some time later they got permanent jobs in the museum. This had been reported to the Ministry of Education, but it took no action, presumably because it was considered that even if the superior officer had recommended them for permanent jobs there was on the face of the record no evidence of improper purpose. The Commissioner—who had been informed by the Ministry of Finance that disciplinary action is usually taken in other departments when civil servants borrow from their subordinates—was of opinion that the Ministry ought to have instituted a disciplinary investigation.

In some cases when there has been serious and more widespread trouble in a State institution the Commissioner has made deep-going investigations into the working conditions of those institutions.⁶

5. PROSECUTION IN CRIMINAL CASES, CONDITIONS IN PRISONS

Some of the most interesting cases in the reports fall under this head. They deal with a great number of very different problems—varying from an investigation into the quality of the coffee for sale in the Prison of Horsens to a discussion of the time prisoners sentenced to be placed in a psychopath's institution have to wait in ordinary prisons where there is no psychiatric treatment. In several cases what ought to be put in police officers' reports has been considered. It has been discussed when it is justifiable to use handcuffs, and in what circumstances it is permissible to transport an elderly lady arrested in the middle of the night to the police station without giving her an opportunity to dress properly. In one case the point in dispute was whether the police ought to remove the photographs and fingerprints of the complainant from their files.

As those subjects belong to criminal law and criminology I do not intend to go into detail with this type of case. But it must be stressed that this field is a very important part of the Commissioner's work.

6. OTHER CASES

As might be expected a number of cases are so special that they cannot be classified under any of the above-mentioned categories.

⁶ 1955-14: The Army Museum; 1957-22: The Inspectorate of Commercial Schools.

For instance, conscientious objectors, serving in State working camps, have several times sought the decision of the Commissioner when a point of dispute has arisen between them and the administration of the camps. There are unexpectedly few complaints from National Service men.

In a number of cases the Commissioner has investigated questions that have caused much public discussion. The best known of these is the so-called *Wamberg* case,⁷ which takes up 95 of the 200 pages of the 1955 report. It deals with a number of complaints, all of them having to do with working conditions in the School of Agriculture in Copenhagen, an institution with university status. One of the complaints dealt with in the case was lodged by Wamberg, a veterinary surgeon, who had had a thesis accepted by the School. Later it was alleged that some of the material on which the thesis was based was incorrect. This led to a heated dispute between his attackers and his supporters and the dispute spread to other fields and resulted in a press discussion. The Commissioner intervened of his own accord and made a very thorough investigation. The publication of this stopped the press discussion.

In a recent case the Commissioner had once more to deal with academic matters that had given rise to public discussion. The complaint was lodged against the then Director of the University of Copenhagen who is also a member of the Faculty of Medicine.

In case 1955-21 the Royal Danish Automobile Club raised the question whether certain motor taxes (the so-called road millions) ought not to be spent for traffic purposes solely. The Commissioner held that the authorities had not been acting *ultra vires*.

1955-31 deals with the question of municipal taxation in Copenhagen. The point in dispute was whether the Ministry of the Interior had powers to permit the municipal council to increase the rates without having new elections.

The problems dealt with in the two last-mentioned cases had been discussed by the press for years before they were put before the Commissioner.

An investigation of quite a different description was instituted in case 1957-5 where the Commissioner discusses under what conditions the State-owned mental hospitals may use the so-called shock treatment or perform certain brain operations on the patients without their consent or the consent of their relatives.

Quite recently the Commissioner has gone into the problem of the censorship exercised by headmasters of State schools over school periodicals edited by pupils.

⁷ 1955-49.

Of course many applications sent to the Commissioner deal with problems that are of very little importance except to the applicants themselves. A very good example of this is the case of the school mistress who complained about the state of affairs in some State-owned buses where the drivers did not enforce the prohibition against smoking in the front part of the buses. Moreover, one of the drivers had been rude to her when she complained to him of the smoking. He was made to apologise and the State railways promised that the rules should be enforced in future.⁸ A case like this serves to illustrate that not all the problems brought before the Commissioner have a legal aspect and that he must be prepared to deal with even the remotest fields of State administration.

As the cases quoted above show the public have brought many and very varied complaints before the Commissioner, and the Commissioner has discussed a great number of problems in dealing with these complaints. The publication of the annual reports have, therefore, contributed very much to the material available to lawyers and others interested in administration, especially from a legal point of view. This is in itself valuable; administrative law is not a subject that can be profitably debated in the abstract, and lawsuits dealing with administrative questions are fairly rare.

It is tempting to try to judge what the effect of the Commissioner's work has been—to investigate in detail in what manner and in what fields he may have influenced administrative methods. But it is too early to undertake this task. Even if inquiries were made in all departments it would probably be impossible to answer all questions without resorting to conjecture. Not till several years have passed will it be possible to judge to what extent and in what way Danish public authorities have been influenced by the control exercised by the Commissioner and what influence it has had upon the relations between the civil service and the public. It will be interesting to anyone interested in administrative work to watch developments in this field.

⁸ 1955-18.

THE WEST INDIES—CONSTITUTIONAL BACKGROUND TO FEDERATION

S. S. RAMPHAL

“THE islands are separated by miles of sea and to a close and more territorial political union it may be said ‘*opposuit natura*’.” This was the conclusion reached by a contributor to the *Journal of Comparative Legislation* in 1900 when writing about the West Indies¹; and it is probable that most persons in the area at the turn of the century would have shared his pessimism. The archipelago, however, is now federated—despite nature’s impediments to unity—but it has taken nearly sixty years to prove that early judgment false. The comment, nevertheless, marks a convenient point from which to look before and after at events and developments which, *ex post facto*, may be said to have constituted a federal movement in the West Indies. A discernable federal movement only really emerged after the turn of the century, but it is fair to say that the experiences and experiments, both political and constitutional, of the eighteenth and nineteenth centuries in intra-regional association and inter-colonial administrative organisation created a favourable climate for the developments of the twentieth century. Indeed, it is probably true to say that no people have ever entered a federal union with a longer history of experimentation in constitutional *inter se* association. The story of these early acknowledgments of the necessity for bridging the waters separating the island communities of the Lesser Antilles (for Jamaica was then too far removed to be involved) goes back to the seventeenth century, and is probably best told in respect of the Leeward Islands and Windward Islands separately, for it was within these two groups of islands, as originally classified, that the experiments took place.

THE LEEWARD ISLANDS

By the middle of the seventeenth century English settlements had already been established in St. Christopher (later known as St. Kitts), Barbados, Nevis, Antigua and Montserrat. By the 1660s, however, all the islands—then referred to as the Caribbee Islands and at that

* This article was originally presented as a paper at the 1958 Cambridge colloquium on Comparative Law.

¹ Walwyn P. B. Shephard, “The West Indies and Confederation,” *Journal of Comparative Legislation*, No. V (August, 1900), p. 224.

time the only British colonies in the Lesser Antilles—came under the executive authority of a common “Governor-in-Chief” stationed at Barbados.² In the beginning, therefore, there was union. The marriage, however, did not last long, it was particularly unpopular with the planters of the islands other than Barbados, and as a result of political pressure exerted locally and representations made in England a separation was arranged. In 1671, a special Commission was issued to Sir Charles Wheeler appointing him “Governor-in-Chief over St. Christopher, Nevis, Montserrat, Antigua, Barbuda, Anguilla and all other the Leeward Islands which His Majesty has seen fit to separate from the Government of Barbados.”³ Thus began the long series of island groupings which was to characterise constitutional developments in the area for nearly 300 years.

Wheeler’s commission established no more than a personal union, but it was not long before the difficulties inherent in dealing with the islands separately and the obvious convenience that would result from a more centralised form of government convinced him of the need for a general assembly of some kind. It was left to his successor, Stapleton, however, to pursue the bold course of summoning such an assembly comprising representatives of the various island legislatures meeting on an *ad hoc* basis.⁴ From a modest beginning as a consultative body the assembly gradually assumed the character of a Federal Council legislating on matters of common concern. The source of the assembly’s legislative authority seems never to have been impugned, and in 1705 a formal meeting was convened at Nevis “to consult and enact such good and wholesome Laws and Ordinances as may be for the safety and advantage of His Majesty’s said Islands.” The assembly thereupon proceeded to pass an Act which was intituled: “An Act to settle General Councils and General Assemblies for the Charibbee Islands in America and to secure to each particular Islands their peculiar Laws and Customs.”⁵ It provided for the creation of a General Council nominated by the Governor and a General Assembly consisting of five representatives from each of the Islands elected by the freeholders from among their number. “The Laws and Legal Customs in force in each and every the Charibbee Leeward Islands” were expressly preserved, but the legislative powers of the new assembly were not defined with any particularity, it being merely empowered in general terms “to join the said Commander-in-Chief and General Council to make, enact and ordain such General Laws

² *Vide* Commission to Francis Lord Willoughby, June 12, 1663 (C.O. 1/17, p. 104).

³ January 25, 1671 (C.O. 1/26, p. 72).

⁴ C. C. S. Hingham, *The Development of the Leeward Islands under the Restoration, 1660-1668*, pp. 228-234.

⁵ Acts of the Assembly of the Charibee Leeward Islands, 1690-1730—No. 28 of 1705.

and Ordinances as may be proper and convenient for all the Charibbee Leeward Islands." In effect, it created a bicameral federal legislature having wide powers; a federal executive, of course, already existed in the person of the Governor. It has been suggested that apart from the feeble New England confederation of 1643 this Act represents the earliest attempt at federalism in the British Empire.⁶ Whatever its other claims to fame, however, this early attempt at political union in the Leewards was never a success. Between 1690 and 1705 the *ad hoc* assembly had passed no fewer than fifty-five Acts, yet after its formal constitution relatively few appeared on the statute-book. The emphasis in legislative activity had shifted back to the Island Councils. Throughout the remainder of the century it virtually ceased to function, and after a lapse of over seventy years it met for the last time in 1798 to discuss the resolution of slavery which had been passed the year before by the House of Commons.⁷

But if the eighteenth century saw the decline of federalism in the Leewards the nineteenth was destined to mark its revival. Peace in Europe after 1815 ushered in a period of calm in the West Indies and the metropolitan government was able to give more careful attention to the many problems of government in the area. In 1816, the experiment was tried of dividing the Leewards into two groups under separate Governors, but in 1833, as part of a more general policy of consolidation, the islands were again united under a common Governor.⁸ At the same time Dominica, which had been a separate colony since 1770, was added to the group and came under the authority of the Governor of the Leewards.⁹ The need which had prompted the establishment of Stapleton's first assembly in the seventeenth century still persisted, however, and the existence of a common executive in the form of the Governor served only to focus attention on its reality. In 1869, the Colonial Office, inspired no doubt by Canada's efforts two years earlier, became alive to the advantage of greater unity and became the champion of federalism in the Leewards. Sir Benjamin Pine was appointed Governor in that year and was directed by the Secretary of State, then Earl Granville, that the end which he was to keep steadily in view was "to form these islands into one colony, with one Governor, one Superior Court and one Corps of Police."¹⁰ Granville was at this time probably contemplating not a federation but a union. Pine, to whom the mandate was given, was soon to discover that even the most modest

⁶ H. E. Egerton, *Federations and Unions in the British Empire*, p. 9.

⁷ Hume Wrong, *Government of the West Indies*, p. 147.

⁸ *Vide* correspondence between Governor of Leewards and Colonial Secretary, February 11, 1833 (C.O. 380/44, No. 31).

⁹ 1883 (C.O. 71/76).

¹⁰ "Correspondence *re* the Federation of the Leewards," C. 353, p. 1 (1871).

alteration in the *status quo* presented innumerable difficulties. "It must be remembered," he wrote, "that these islands, small and insignificant as they may be, have for centuries possessed forms of government not only wholly unsuited to the times when they were founded, but which while ceasing to be applicable to present circumstances have kept up among the ruling classes a spirit of self-importance and narrow patriotism which may seem ludicrous but cannot be ignored."¹¹ The greatest obstacle to agreement was the proposal for a common Treasury: "What! they say," reported Pine on the attitude of the planters of St. Kitts, "shall the rich and prosperous island of St. Kitts share its overflowing Treasury with the bankrupt island of Antigua?"¹² Faced with an almost unanimous opposition from the islands, Granville was forced to abandon union in favour of federation, though for a time he remained adamant over the strength of the central authority. Insularity, however, was not to be easily breached and when, eventually, after eighteen months of negotiation, Pine obtained the approval of all the Island legislatures, it was to a federal union far removed from the Secretary of State's earlier plans.

In 1871, the British Parliament passed the Leeward Islands Act,¹³ and this, as amended by the Leeward Islands Legislature, embodied the federal constitution which remained in operation until defederation in 1957. The Act established the colony of the Leeward Islands consisting of six presidencies—Antigua, St. Kitts, Nevis, Dominica, Montserrat and the Virgin Islands. These were later reduced in number to four, first by the amalgamation of St. Kitts and Nevis in 1882,¹⁴ and later, in 1940, by the separation of Dominica.¹⁵ It created an Executive Council nominated by the Governor, and a legislative body styled the "General Legislative Council" sitting annually at Antigua and consisting in equal proportions of official members holding their seats *ex officio* and unofficial members elected by the unofficial members of the island legislatures from among themselves. The General Council was empowered to legislate on a defined number of subjects, modest enough in themselves, but it was further empowered to legislate on any matter referred to it by an island legislature, and this, from the point of view of the General Council, proved a productive source of power. There was no separate federal revenue nor any federal control over taxation. As a result, the device was adopted of apportioning federal expenses among the Presidencies in accordance with the number of representatives from

¹¹ *Ibid.*, p. 9.

¹² *Ibid.*, p. 2.

¹³ 34 & 35 Vict. c. 107.

¹⁴ Federal Act, No. 2 of 1882.

¹⁵ Order in Council of December 20, 1939, issued under 1 & 2 Geo. 6, c. 10.

each island in the General Council. In addition, moreover, only the bare skeleton of a governmental structure was established at the centre, and policies determined by the General Council had to be implemented by officers directly paid and responsible to the Island governments. Caught between the pressure for union from the Colonial Office and the determination of the Island councils to preserve the *status quo* a formula of political union was evolved which produced little more than a confederation. Judged even as such, however, it was far from effective. A former President of Nevis once described it as "a government powerless in itself to do good, but which has developed great capacities for hindering any good being done by the several parts."¹⁶ This opinion was substantially confirmed by the Royal Commission appointed in 1884 "to inquire into the public revenues, expenditure, debts and liabilities" of some of the West Indian colonies when they wrote of the Leeward Islands Federation: "the results both as regards better administration and greater economy have not as yet been satisfactory. . . . We are of opinion that the system of federation adopted in 1871 has not succeeded fully because it was but a partial adoption of the principles of union . . . the inhabitants will, we hope, now take the further step of securing all the advantages of co-operation by making the union real and complete."¹⁷ Nothing, however, was done in this direction and the federation entered the twentieth century in its old form.

Dissatisfaction, however, persisted, and by the 1920s "defederation" had become a political catchword in the Leewards; yet the Wood Report of 1922 recommended neither a strengthening nor a loosening of the ties. In 1929, the unofficial members of Antigua's Executive and Legislative Councils petitioned the Secretary of State suggesting a possible combination with Trinidad and the Windwards under a single Governor; and in 1932, impelled by the effects of the economic depression in the area, he indicated that the time seemed ripe "for an inquiry to be held into the possibilities of closer union between Trinidad, the Windward and the Leeward Islands or some of them."¹⁸ The Fergusson Commission which conducted the inquiry reported in 1933 that so far as Trinidad was concerned "no proposal for closer political union with any of the other islands would receive support at the present juncture and that it would be useless to discuss the matter further," and they advised that it would be impracticable to establish a "real federation" between the Leeward and Windward groups. They suggested, however, the dissolution of

¹⁶ C. S. Salmon, *The Caribbean Confederation* (1888).

¹⁷ C. 3840 (1884), iii, pp. 39-41.

¹⁸ Cmd. 4383 (1933), p. 35-36.

the Leeward Islands Federation and the grouping of the islands of both the Leewards and Windwards under one Governor.¹⁹ The resulting organisation would have been "an association of eight colonies under one Governor, but otherwise independent of each other and autonomous in every respect."²⁰ The suggestion was referred to the island legislatures, but there was such a divergence of opinion, particularly over the justification of the additional expense involved, that the Secretary of State decided not to pursue it.²¹ Nothing was in fact to happen until defederation in 1957 as a prelude to the more inclusive federal union.

I have tried to outline in a few paragraphs the experiments in political association in the Leewards which occupied the best part of two centuries. Inevitably much has been omitted, but enough has probably been said to justify some general conclusions. The central theme of the experiments has clearly been the quest for administrative efficiency and economy and their inspiration, up to very recent times, has derived entirely from those responsible for the administration: from individual Governors, from Colonial Secretaries in London, and from Royal Commissions appointed to assist and advise them both. What response there was from the islands themselves, again until very recent times, found expression in the opposition of the Councils elected on a very limited franchise. Yet a measure of unity was attained.

THE WINDWARD ISLANDS

In the Windwards, meanwhile, the same forces were at work. The Windward Islands, unlike the Leewards, were all conquered colonies and they have never enjoyed the traditions of representative government to the same degree. During the seventeenth and much of the eighteenth centuries the Windward Islands felt the full impact of European wars fought in West Indian waters and although sporadic attempts were made throughout this period to establish British authority over them anything like organised government must have been virtually unattainable during those troubled years. Thus it has been estimated that in the one hundred and seventy years between 1633 and 1803 St. Lucia changed hands between the British and French no fewer than twelve times.²² The real story of island groupings in the Windwards begins therefore at a somewhat later date.

The Peace of Paris in 1763 had brought a temporary lull to Anglo-French conflict in the Caribbean and Grenada, with the little

¹⁹ *Ibid.*

²⁰ Report of the West Indies Royal Commission of 1938; Cmd. 6607 (1943), p. 325.

²¹ C.O. 136/24.

²² Hon. C. Gideon Murray, "Federation of Certain West Indian Colonies"—paper read to the West India Committee, November 22, 1911.

Grenadines attached, St. Vincent, Dominica and Tobago were ceded to Great Britain. Grouped together as the "Southern Caribbee Islands," they were immediately formed into one Government at Grenada. Brigadier-General Robert Melville was appointed Captain-General and Governor-in-Chief and he proceeded to set up a General Council of Government for all the Islands.²³ Once again, in the beginning, there was union. The experiment, however, was short-lived. In 1771, Dominica was separated and placed under the governorship of Sir William Young with a bicameral legislature of the old representative type. In 1776, St. Vincent followed suit, and when, in 1783, Tobago was ceded to the French by the Treaty of Versailles the union had ended by the process of elimination.

Where the War of American Independence left off the French Revolutionary Wars took over, and not until the treaty of Paris in 1814 was it finally decided that the English and not the French were to be responsible for the island colonies. All four of the "Southern Caribbee Islands" were returned to Great Britain with St. Lucia added to them, but no attempt was made to revive the former union and the islands were administered separately under separate Governors. In 1833, however, in pursuance of the policy of consolidation already referred to, Dominica was transferred to the Leewards²⁴; while among the remaining islands of the Windward group a new arrangement in common administration was tried out. Barbados, not strictly a member of the Windwards and, since her separation from the Leewards in 1671, independently administered, was brought into the scheme of the association and Sir Lionel Smith was appointed Governor and Commander-in-Chief of Barbados, St. Vincent, Grenada and Tobago.²⁵ The scheme, however, was the mere ghost of the former union; the sole co-ordinating influence now lay in the authority of the common Governor-in-Chief. The separate island legislatures all continued to function—indeed, it is most unlikely that Barbados would have consented to any greater sacrifice than that involved in sharing their executive head. The Governor resided in Barbados which now superseded Grenada as the centre of government; while the other islands were administered by resident Lieutenant-Governors.

Viscount Goderich was the Secretary of State at this time and, as with Granville later in the century, he was greatly impressed with the possibilities of a real union of the islands. But to a large extent his hands were tied. The islands all possessed representative legislatures and it was therefore no longer open to the Crown to legislate for them. Union, if it were ever to be achieved,

²³ C.O. 102/1 and 102/2.

²⁴ C.O. 71/76.

²⁵ February 21, 1833 (C.O. 29/33).

must emanate from the island legislature themselves. Goderich went as far as he could have gone by utilising the prerogative power of appointing the King's representative so as to provide the islands with a common executive; but he was convinced that it was "to the greatest benefit of the public interest" that the example set in the executive sphere should be followed and that the legislative and judicial functions of government should "centre in one assembly and one court."²⁶ But the several island legislatures were not imbued with the same enthusiasm for union and the further step was never taken. Indeed, the Windward Islands have never advanced beyond this stage of minimum union. What changes have taken place since then have been confined to alterations among the constituent members of the executive union, and have been achieved by the simple process of amending the Governor's commission. In 1835, Trinidad and St. Lucia were brought into the "union," when a commission was issued to Smith, already Governor of Barbados, St. Vincent, Grenada and Tobago, appointing him "Governor and Commander-in-Chief over our said islands called Trinidad and St. Lucia in America."²⁷ From the beginning, however, Trinidad enjoyed a certain independence when Sir Henry George McLeod was appointed Governor of the Island.²⁸ From that time onwards, Trinidad has developed as a separate colony. In 1869, with Pine's mandate to federate the Leewards there came out of the Colonial Office a "Scheme of union" for Trinidad, Grenada and Tobago. Draft Letters Patent were prepared to give effect to the union, but the proposals clearly did not go beyond a common Governor and the scheme was abandoned in the same year.

Pine's moderate success in the 1870s in securing the federation of the Leeward Islands encouraged the Colonial Office to hope for similar constitutional developments in the Windwards; and, in 1871, Governor Rawson was instructed along such lines: "As you have been aware from the time of your appointment as Governor," wrote the Secretary of State to him some time later, "Her Majesty's Government are anxious that the Islands of the Windward group should be federated under a stronger and more efficient system of administration than can be secured to each of them while they continue separate."²⁹ Rawson himself was far from convinced of the wisdom of "confederation"—as the proposal was referred to in the Windwards—and made only a half-hearted attempt to achieve it. Conscious of his own doubts and of the almost certain opposition

²⁶ Dispatches to Smith of March 7, 1833 (C.O. 29/33, pp. 78-95); *vide* also C.O. 381/12, pp. 334-375.

²⁷ Letters Patent of February 27, 1835 (C.O. 381/74, p. 73).

²⁸ Letters Patent of April 8, 1842 (C.O. 381/74, p. 205).

²⁹ "Papers relating to the late disturbances in Barbados," C. 1539 (1876), p. 5.

of the representative legislatures in Barbados, Grenada and Tobago he recommended that confederation should be preceded by the conversion of the representative legislatures into single chambers, in which the Crown would have such powers as would enable it to bring about united action on the part of the different islands.³⁰ The Secretary of State agreed, and instructed him that the time was ripe for the change. But if confederation was distasteful to the island legislatures, confederation on the basis of Crown Colony government was absolute anathema. In the minds of the planters the issues quite naturally became intermingled, and once that had occurred the fate of confederation was sealed.

Rawson was succeeded in 1875 by J. Pope Hennessy, at once a courageous administrator and a confirmed federalist. At the same time the Earl of Carnarvon became Secretary of State and one of his first acts was to dissociate the issues of confederation and internal constitutional amendment. Carnarvon's ability for compromise, however, soon led him to disavow one of the features of the confederation on which Granville had earlier in the Leewards placed much importance. Confronted with the opposition of the Barbados House of Assembly to any scheme involving a common treasury, Carnarvon readily agreed that "this community of financial arrangements" need not be a feature of the confederation and that, subject to such contributions as might be agreed to be levied for the maintenance of joint public institutions, the revenue and expenditure for each island would be administered separately as before. "Confederation" was taking on its real meaning. In the result Hennessy's actual proposals—"a scheme for administrative confederation" as he called it—amounted to little more than a six-point programme for the creation of certain common public institutions financed by the islands of the Windward group including Barbados. His scheme provided for an Auditor-General, a common lunatic asylum and a common lazaretto, a Chief Justice of the Windward Islands, a common police force, and common arrangements for the transportation of prisoners.³¹ In the smaller islands the proposals were favourably received, but in Barbados by this time the very mention of the word confederation had become the signal for political agitation. The House of Assembly was adamant, and in 1876, on a motion proposing a joint conference of representatives from all the islands councils to discuss the matter, it passed a resolution in the following terms: "That the House of Assembly in Barbados have no intention to become one of a Federation of Islands, or to merge their independent separate legislatures, either for local or general purposes of legislation in a federative legislature."³² The story of the events

³⁰ *Ibid.*, p. 3.

³¹ *Ibid.*, p. 73.

³² *Ibid.*, p. 95.

following has often been told and cannot be related in any detail here. Suffice it to say that the opposition of the planters gradually hardened and became organised and that at the same time there grew up in the minds of the masses a fear and distrust of confederation—a situation, in Hennessy's view, deliberately created by the systematic misrepresentation of the confederation proposals by its enemies. Local demonstrations grew into riots and there was talk of landing troops to maintain the peace. Proposals from Hennessy for reform in the system of land tenure ensured his unpopularity with the House and it petitioned the Secretary of State for his recall. Towards the end of the same year Hennessy was promoted to Hongkong.³³

With the fall of its champion, confederation in the Windwards suffered the exile of a lost cause, while in Barbados the forces of separatism gained strength and confidence from the victory of the anti-confederalists. In 1884, the Royal Commission seeking a formula of closer association in the Windwards, recommended that the four islands of Grenada, St. Vincent, St. Lucia and Tobago should separate from Barbados to form "a real union among themselves."³⁴ Local feeling in the islands other than Barbados was, however, unanimously against the proposal and nothing was done to implement it; union with Barbados was obviously a much less attractive proposition than confederation with her. Notwithstanding this, the separation from Barbados was arranged in 1885, but in all other respects the constitutional position remained as before. In 1899, following on a recommendation of the Royal Commission of 1896, Tobago was converted into a local government district of Trinidad and since that year has remained a part of the renamed colony of Trinidad and Tobago. As was already mentioned Tobago's place in the Windward union was taken by Dominica in 1940. Thus, until the establishment of the inclusive federation in 1957, the system established for the Windward Islands in 1885 remained intact. The Governor resided in Grenada and was the common executive head, while the other islands were presided over by resident administrators working in co-operation with and under the authority of the Governor. There was no common legislature and, as a consequence, neither common laws nor a common treasury or tariff. Indeed, apart from special arrangements relating to the Supreme Court and the Court of Appeal, the only expressions of functional unity were in the common audit system established in 1889, and a common lunatic asylum at Grenada. Within the latter years of the union the nucleus of a central civil service had been provided through the addition of

³³ *Vide*, for further correspondence, C. 1559 (1876) and C. 1679 (1877).

³⁴ C. 3840 (1884), p. 41.

specialist officers to the Governor's staff but even "administrative confederation" remained unrealised in the Windwards.

JAMAICA

Jamaica was over a thousand miles removed from the scene of these activities in the Lesser Antilles and, not surprisingly, was a stranger to them. Isolated though she was, some mention might be made of her here for she has played a small part in this story of regional groupings. The largest of the British islands in the Caribbean, she has taken under her wing the Turks and Caicos Islands, grouped together more than six hundred miles to her extreme north-west and the Cayman Islands on the west. The Caymans had been vaguely associated with Jamaica from as early as the middle of the seventeenth century, and in 1863 they were, by an Act of Parliament, definitely placed under the authority of the Governor and Legislature of Jamaica.³⁵ The connection with the Turks and Caicos Islands has a somewhat longer history. They are geographically the southernmost of the Bahamian group and were included originally in the colony of the Bahamas. In 1848, however, they were separated from the Bahamas and became subject to the supervision of the "Captain-General and Governor-in-Chief of the Island of Jamaica." Ten years after the position of the Cayman Islands had been clarified a similar treatment was applied to the Turks and Caicos Islands and under the authority of an Act in Parliament they were finally annexed to and became a dependency of Jamaica.³⁶ It might be mentioned also, when talking of Jamaica's part in this story of regional association, that between 1862 and 1884 the administration of British Honduras had been placed in the hands of a Lieutenant-Governor acting under the authority of the Governor-in-Chief of Jamaica. British Guiana is thus the only territory in the area which has not experimented with these early *inter se* constitutional arrangements; but British Guiana is herself the product of a union of the three former Dutch colonies of Demerara, Essequibo and Berbice.³⁷

THE IDEA OF ASSOCIATION

Late in these experiments there began the movement towards a wider political association of all the British West Indian colonies and it is tempting to suggest that the early regional groupings in the Lesser Antilles have been a part of an evolving pattern of this federal movement. The temptation, however, must be resisted; for it is clear

³⁵ 26 & 27 Vict. c. 31.

³⁶ Order in Council of August 4, 1873, issued under 36 Vict. c. 6.

³⁷ *Vide*, Sir C. Clementi, *A Constitutional History of British Guiana*.

that there never was such symmetry in these constitutional developments. In the first place, the circles of association have not generally widened. The Leewards lost first Barbados and later Dominica; while contraction has been the theme of all Windward development. In 1835, the Governor of Barbados held six islands under his executive authority; by 1889 Barbados was on her own, and Trinidad and Tobago had united outside the Windwards, and until 1940, when Dominica returned, the Commission of the Governor of the Windwards extended over only three of the former islands. It necessarily follows that the circles have never merged. Attempts in 1934 and 1947 to achieve a Windward-Leeward Union both ended in failure, and there was little done hitherto to bring the eastern and western groups together. There has not been, therefore, an ordered constitutional progress towards federal union. Yet it seems undeniable that from the very beginnings of British influence in the Caribbean there has been a centripetal force steadily drawing these territories together. The source of the energy has not always been the same. In the seventeenth and early eighteenth centuries, a period of constant struggle for supremacy of metropolitan authority, it derived from the need for common defence. In the nineteenth century, in a time of comparative peace, it derived from the deed for greater efficiency and economy in the administration of the territories, and its impetus came from those responsible for their administration. This need remained, but the twentieth century added a new and more dynamic force generated by the demand for political independence and the concomitant desire for economic stability.

It is in this respect that these regional groupings, achieved or merely contemplated, are so important; for they represent the earliest stages in the growth of the idea of association which has now reached maturity in the Federal Constitution. Its development was by no means easy. The impotence of the Crown before the doctrine of *Campbell v. Hall*,³⁸ and, indeed, the recognition by the Colonial Office, even after the actual power to legislate had in many cases reverted in the Crown, that in matters such as a union of territories nothing should be done which did not meet with the approval of their legislatures, in effect gave the island councils a veto over any such scheme. It was on this basis in 1885, after the Windward Islands had surrendered their representative institutions in return for Crown Colony Government, that Her Majesty's Government declined to impose a union which it obviously favoured after it had been made clear by the island councils that "they would have none of it."³⁹ The battle for unity had, therefore, to be fought in the local legislatures, and in most cases, as

³⁸ (1774) 4 Cowp. 204.

³⁹ *Vide*, N. Darnell Davis, *Colonial Consolidation* (1890).

we have seen, it was lost. A congenital parochialism: a fear on the part of the wealthier islands of having to carry their weaker associates; a sense of security in entrenched power, all contributed to form an effective resistance at this level. Moreover, it must never be forgotten that the "old representative system," which traditionally has been regarded as a proud inheritance, and which in these islands, in many cases, preceded the establishment of Crown Colony Government, was truly representative in little more than name. As late as 1876 in Barbados—and nowhere was the system more revered—the Lower House was returned by an electorate of 1,000 out of a population of 180,000.

In 1884, the Royal Commission appointed to inquire into the financial state of the Leewards, the Windwards and Jamaica, considered, in supplementary remarks, the question of closer association of all the territories.⁴⁰ Their recommendations, however, went merely to the advantages of functional unity, and the possibility of political union was by implication rejected. In 1894, under his Commission to inquire into the state of affairs existing in Dominica, Sir Robert Hamilton again considered the prospect of a wider unity. This time consideration centred on the possibility of a federation. Hamilton professed to be "alive to the benefits which would result" from such a political association; but he advised that the time had not yet arrived in the West Indies for the establishment of federal government, and he gave as his reason the absence of a spontaneous desire for it on the part of the residents. In his opinion the path towards federation lay through the development of local self-government; for only as a result of an intimate participation by the residents in the affairs of government would the advantages of political association be brought home to them.⁴¹ Local self-government had not in fact been achieved in even the most advanced of the British West Indian colonies as late as 1957, and a system whereby the "residents" sat in the Legislative Assemblies as representatives but were denied any measure of responsibility certainly did not provide that intimate participation in the affairs of government which would lead them to recognise even the administrative advantages of federation. It would be erroneous, therefore, to attribute the spontaneous desire for federation and the consciousness of its many advantages which have arisen in the West Indies to the development of some measure of local self-government. The desire and the consciousness have been generated rather by the failure to acquire a larger measure of responsibility, and the explanation of this process lies in the fact that

⁴⁰ C. 3840 (1884), IV, p. 3.

⁴¹ C. 7477 (1894), XXXVI.

political and economic self-determination, and not merely administrative economy and efficiency, was to become the unifying force.

The Royal Commission of 1896 gave "special consideration" to the suggestions made to them "for the federation of the West Indian colonies under a single Governor-General," but found themselves "unable to recommend such a federation."⁴² With the turn of the century the door was, therefore, officially closed to a federal union of all the colonies, and it was left to individual champions to keep the cause alive. Some indeed had come forward much earlier. In 1849, an intriguing proposal emanated from an anonymous "officer of the Jamaica Government" who suggested the establishment of "the West Indian Joint Stock Company" with a Court of Directors who would take over from the Colonial Office the direction of the affairs of the Colonies.⁴³ Another interesting proposal was that made in the 1880s that the various colonies should join the Canadian federation as individual provinces. From time to time since then this proposal has been revived but nothing like the same concentration of effort which went into the early proposal has since been achieved. Sir John MacDonald was supposed to have given his blessing to the project and a vigorous campaign on its behalf was launched in Canada by its champion—a Canadian journalist named A. Spencer Jones. The proposal got as far as being debated in the Jamaica Legislative Council but was rejected.⁴⁴

These individual efforts were carried over into the twentieth century, and of them perhaps the most important, certainly the most comprehensive, was the plea made in 1911 by the Honourable C. Gideon Murray, later Viscount Elibank, then a member of Parliament and a former administrator of St. Vincent. Murray's scheme of political association was confined to the eastern group of the West Indian colonies and his proposal was modelled on the lines of the Australian Federal Council of 1885. In short, there was to be an association of legislatures through a General Assembly, founded on "the principle of legislation for States or Governments in their corporate or collective capacities and contra-distinguished from the individuals of whom they consist."⁴⁵ The scheme was unfavourably received by the West India Committee to whom it was first unfolded and it later failed to arouse enthusiasm in the colonies. The First World War interrupted these individual efforts, but with the advent of peace the possibility of unity was again pursued. In 1920, Sir

⁴² C. 8655 (1897), p. 23.

⁴³ "Suggestion for a United West Indian Government and Joint Stock Company," Jamaica, 1849.

⁴⁴ *Vide*, Alice R. Stewart, "Canadian-West Indian Union, 1884-1885," *Canadian Historical Review*, Vol. 31 (1950), p. 369.

⁴⁵ Hon. C. H. Murray, *Federation of Certain West Indian Colonies* (1911).

Edward Davson then President of the associated West Indian Chambers of Commerce put forward a plan of association embracing all the colonies. Even more modest in its nature than Murray's the scheme provided for a Central Conference composed of official and unofficial representatives of the various colonies with a permanent secretariat and meeting at fixed intervals to make recommendations on matters of common interest. The authority of this representative body was admittedly to be only advisory; its decisions were in no way binding on the individual governments. The scheme was submitted to the Secretary of State, and he referred it to the legislatures. In a majority it was favourably received, but there were some important exceptions; Barbados politely declined the invitation. In the absence of unanimity, the matter was allowed to remain in abeyance.

In 1922, the Wood Report was published.⁴⁶ Major Wood's mission on behalf of the Secretary of State for the Colonies had been prompted by the growing demand throughout the territories for a larger measure of representative government, and he was, therefore, more particularly concerned with this aspect of constitutional reform than with the larger question of federation. He did, however, consider it, and in so doing he conceded "that it would be to the evident advantage of these colonies to secure the machinery for greater unity and co-operation." Nevertheless, he advised that there were practical and political objections which made the establishment of federal government at that time impossible. The practical objection to "federating an archipelago" lay in the barriers to social, economic and political integration which the stretches of water inevitably create. These barriers, he suggested, had not yet been sufficiently demolished by the development of a West Indian consciousness, and, as a result, there was not a deliberate demand of local opinion for political unity. "So long as public opinion stands where it does today," he concluded, "it is both inopportune and impracticable to attempt amalgamation of existing units of Government into anything approaching a general federal system."⁴⁷

In the following year, on the initiative of the Jamaica Legislature, Sir Edward Davson's scheme for a standing Conference was revived and, following on a preliminary conference in London in 1926, the first West Indian Conference assembled in January, 1929, in Barbados. The agenda comprised such matters as agriculture, the future of the sugar industry, a West Indian university, aviation and shipping, marketing and publicity, the extension of scientific research and problems relating to public health. For little more than a week the representatives of the colonies discussed the common problems facing

⁴⁶ Cmd. 1679 (1922).

⁴⁷ *Ibid.*, p. 32.

their governments, and "there was a deep-seated realisation that real progress could only be achieved through the development of inter-colonial unity and co-operation."⁴⁸ Public opinion, it appears, had at last begun to move.

REPRESENTATIVE GOVERNMENT

The 1930s began the final and decisive phase in the federal movement. During those years and after them the scene changed entirely and it is important before moving on, to survey from this point the developments of the first three decades of the century. Two features must be noted. The first is that the federal movement, if I may so dignify these sporadic flirtations, had not yet become a West Indian movement. Although the idea of political unity had, during these years, attracted adherents beyond the pale of the Colonial Office, federation was yet too delicate a plant to flourish in West Indian soil. Neither Sir Edward Davson nor the Hon. Gideon Murray, unpretentious as were their proposals, were representative of West Indian political thought, and there had not yet arisen on the local scene any important body of opinion prepared to undertake the transplanting. The second feature of these developments was more dynamic. During the period the case for closer association was put on a new and altogether more satisfactory basis than that nineteenth-century preoccupation with administrative economy. Federalism, it was now contended, created the machinery for co-operation between the various colonies, and it was only as a result of such co-operation that social and economic prosperity could be secured in the changed conditions of the modern world. This was the theme of Murray's proposal; it was also clearly the basis on which Major Wood had recognised the advantages of political unity. Major Wood's visit in 1921 had been arranged because of the demand which had arisen in the West Indies for the bestowal of a measure of representative government. The basis of this demand was the desire for what Sir Robert Hamilton might have called "a more intimate participation by the residents in the affairs of government." This did not mean that there was a clamant demand for self-government; the Wood Report expressly stated that nowhere in the West Indies was there a demand even for responsible government. What it did mean can only be understood against the background of constitutional developments in the individual colonies. The fifties and sixties of the nineteenth century saw the advance of the North American and Australian colonies from representative to responsible government. The sixties

⁴⁸ Dr. T. W. Wallbank, "Constitutional Evolution in the British West Indies," *United Empire*, March, 1934, p. 137.

and seventies were marked in the Caribbean by the retrogression of the West Indian colonies from representative to Crown Colony Government.⁴⁹ In 1866, the authority of the United Kingdom Parliament was employed to so remodel the Jamaican legislature,⁵⁰ and this procedure was followed in 1876 to achieve a similar result in Grenada, Tobago and St. Vincent.⁵¹ British Honduras and the Leeward Islands undertook the conversion themselves by virtue of their constituent powers. Only Barbados, the Bahamas, and Bermuda retained their institutions intact. The constitutional process by which the change was made was the abolition of the bicameral legislature and the reconstitution of a nominated Legislative Council in its place. In effect, the elected lower house was destroyed and the nominated upper house preserved as the sole legislative body.

By 1876, of the thirteen "old representative" legislatures eight had lost their elected members entirely. Only in Barbados, the Bahamas, and Bermuda, and in Dominica and Montserrat in the Leeward Islands Federation were elected representatives employed in the business of government. Of the others, Trinidad and St. Lucia continued with wholly nominated chambers, and, in 1870, when the elected majority was demolished, the council of British Honduras assumed a similar form.⁵² British Guiana persisted with the nicely balanced Dutch arrangement. In 1884, after eighteen years of pure Crown Colony government, Jamaica commenced the climb back to representative institutions with the reintroduction of elected members to the Legislative Council.⁵³ Her example, however, was not followed in the other colonies: indeed, in 1898 Dominica and Antigua were compelled to accept wholly nominated chambers.⁵⁴ By the end of the century, of the colonies with which we are concerned, only Barbados, the Bahamas, Jamaica and British Guiana returned elected members to their legislatures. In Jamaica, although the elected members had been increased in 1895 from nine to fourteen,⁵⁵ they were none the less in a minority, while in British Guiana an elected majority existed only in respect of financial measures. The first two decades of the new century brought no substantial changes in the composition of the councils and, although the political situation had altered vastly since the 1860s, the expedients which were then adopted continued to be employed.

It was against this background that Major Wood investigated the demand for "representative government." It amounted in most

⁴⁹ Martin Wight, *The Development of the Legislative Council, 1606-1945*, p. 60.

⁵⁰ Order in Council of June 11, 1866, under 29 Vict. c. 12.

⁵¹ 39 & 40 Vict. c. 47.

⁵² Wrong, *op. cit.*, p. 106.

⁵³ Order in Council of May 19, 1884.

⁵⁴ Wrong, *op. cit.*, p. 73.

⁵⁵ Order in Council of October 30, 1895.

colonies to a demand for the re-introduction of the elective principle, and in others, such as Jamaica and British Guiana, where the principle was already active, to a demand for an elected majority in the council. In many cases these demands were coupled with proposals for a liberal franchise on which such members would be returned; for from the point of view of the disfranchised section of the community an elected majority would otherwise be worth very little. It must be stated, however, that this latter claim for an extension of the franchise was neither strenuously nor generally pressed in 1921, the reason being that the working class movement which brought the question of electoral reform to the fore in the thirties had only just begun.

Major Wood advocated no sweeping reforms, but the elective principle was to progress slightly. He proposed an elected majority for Jamaica, and recommended an elected minority on the councils of Trinidad and the Windward Islands. He did not approve of similar reforms for the Leeward Islands, but he did leave open the question of their application to Dominica. British Honduras was not considered, and although British Guiana was, he proposed no changes. The question of franchise was almost entirely untouched. The Report, in the result, undoubtedly fell short of the aspirations of the new indigenous political movements, and the attempts to implement its recommendations did not result in political calm. By 1930, elected members had been introduced into the councils of Trinidad,⁵⁶ the Windward Islands⁵⁷ and Dominica⁵⁸; in no case, however, was there an unofficial majority, and in all cases there was an elected minority. Jamaica had not received the proposed increase in elected members, and although she enjoyed an unofficial majority in the Legislative Council, had to be content with an elected minority. In the meanwhile, British Guiana had lost her Dutch legislative institutions and with them the elected majority which had existed in the Combined Court.⁵⁹ In 1935, British Honduras,⁶⁰ and, in 1936, the Leeward Islands,⁶¹ adopted elected minorities. These new vestments, however, were but the trappings of representative government. The franchise was restricted to a mere fraction of the population. As late as 1938, the registered electorate of Trinidad was 6.6 per cent. of the colony's population, and the corresponding figure for Barbados in the same year was 3.3 per cent. Moreover, a wide gap yawned between the electoral qualification and that for membership of the council. In Trinidad in 1938 the income qualification for

⁵⁶ Order in Council of April 16, 1924.

⁵⁷ Orders in Council of March 21, 1924.

⁵⁸ Dominica Constitution Ordinance, No. 21 of 1924.

⁵⁹ Order in Council of July 17, 1928.

⁶⁰ British Honduras Constitution Ordinance, No. 13 of 1935.

⁶¹ Antigua Constitution Ordinance, No. 20 of 1936. Montserrat Constitution Ordinance, No. 16 of 1936. St. Kitts-Nevis Constitution Ordinance, No. 14 of 1936.

membership of the Legislative Council was six times as high as the income qualification for registration as a voter; in Barbados the multiple was four.

FEDERAL UNION

The Closer Union Commission of 1932 was not concerned with the problem of internal constitutional reform, and their proposals did not attempt a solution. Inevitably, the voices of 1921 grew louder and more insistent throughout the thirties. The economic depression brought to maturity the growing working class movement, and the demand for economic justice dominated the social scene. The initiative in political agitation passed to these hands, and, as a result, the need for social reforms reinforced the demand for constitutional advance. Between 1935 and 1938, labour unrest produced a succession of serious strikes throughout the islands and attention was forcibly called to the need for remedial measures. As a result, in 1938, the West India Royal Commission was appointed with wide terms of reference "to investigate social and economic conditions in Barbados, British Guiana, British Honduras, Jamaica, the Leeward Islands, Trinidad and Tobago, and the Windward Islands, and matters connected therewith, and to make recommendations."⁶² These movements of the thirties were, of course, centred in the respective colonies, and the traditional insistence on reforms in the individual legislatures was by no means dropped. Extension of the franchise and of the elected membership of the Legislative Council was the immediate demand. In fact, however, the situation had altered rapidly since 1921 when Major Wood had reported "the absence of a popular demand of local opinion for federation." By 1938, the concept of federation had been transplanted and was flourishing in West Indian soil. The explanation of this development lies almost wholly in the political situations which had developed during the period. Neither the Wood Report nor that of the Closer Union Commission of 1932 had resulted in any substantial satisfaction of the demands for constitutional reform; as a result, West Indian leaders of the new labour movements struggled in an atmosphere of political frustration. Already, however, the practical advantages of co-operation had been recognised, and the system of intercolonial conference had established a basis of functional association. Gradually the idea began to take root that the path to political advancement lay through a federal union. As a political entity, it was argued, the colonies, through a co-ordination of their economic and political strengths, would be in a position to establish their economic stability and demand their political independence. Economic prosperity and political freedom,

⁶² Cmd. 6607 (1945), Report of West India Royal Commission.

so inextricably tied in the British West Indies as almost to partake in their relation of the chicken or the egg conundrum, would be the twin products of federation. In any event, dominion status for a federal union held safer promise of attainment than self-government for the individual colonies. The idea possessed obvious attractions and it is noticeable that throughout these years whenever the need for social and political reform was advanced the claims of federation were never far behind.

The West Indian Conference of 1932 was the first demonstration of the new movement. In that year the Closer Union Commission had been appointed, and when it was revealed that its terms of reference did not embrace either the possibility of a West Indian federation or the problem of internal constitutional reform, a number of liberal-minded West Indian politicians gathered at Rosseau in Dominica with the avowed purpose of elaborating proposals for federation.⁶³ The conference was attended by representatives from Barbados, Trinidad, Grenada, St. Vincent, St. Lucia and the Leeward Islands. They decided that it was "desirable in the general interests" of those colonies that a federation should be effected, and they proceeded to design a federal structure and draft a federal constitution for the area. The West Indian National League was formed at Rosseau to carry on the work of the Conference, but as an organisation it never played a real part in later developments. Nevertheless, political leaders in all the colonies kept the hopes of the Conference alive and maintained a certain identity of purpose. As the Royal Commission of 1938 reported—"it is evident that throughout the British West Indies contact is being maintained between those in each colony who are most interested in securing rapid political progress, and constitutional developments, such as the widening of the franchise, in any area may be found to reinforce the strength of the movement for federation of the whole group."⁶⁴ Contact had indeed been maintained. Some time earlier the West Indies and British Guiana Labour Congress had been established, and in 1938 a conference of the Congress attended by representatives from Barbados, Trinidad and British Guiana was held in British Guiana with the object of preparing a memorandum for submission to the Commission. An extensive programme of social reform was agreed upon and a comprehensive scheme for federating all the British West Indian colonies was prepared.

Such was the progress which federation had made since 1921. The Royal Commission became aware of the development at an early stage in their inquiry, and accordingly, they put to most of the

⁶³ "Proceedings of the West Indian Conference" (October–November, 1932).

⁶⁴ Cmd. 6607 (1945), pp. 326–327.

witnesses who appeared before them in a representative political capacity the question whether they favoured the idea of the closer union of the West Indian colonies. In the words of their Report: "Almost every witness thus questioned was in favour of closer union, but few of them were able or prepared to define the degree or nature of federation which they conceived desirable." On the basis of their general impression, however, they doubted whether the time was yet ripe for the introduction of any large scheme of federation. Local pride, an active insularity, and the scepticism of well-informed opinion based on it, made them doubt the "readiness of West Indian opinion to accept federation in principle." Even if this doubt was resolved, however, they found the practical difficulties—presumably those created by the distance separating the colonies—to be still insuperable. Accordingly, with an apparent timidity by no means characteristic of the rest of their Report, they reiterated the conclusion arrived at by Major Wood in 1921 that it was "both inopportune and impracticable to attempt amalgamation of existing units of government into anything approaching a general federal system." Having advocated caution, the Commissioners were both more hopeful and more positive in their recommendations as to future developments. Their concluding remarks on the subject were important: "Nevertheless a combination into one political entity of all the British possessions in the Caribbean area is the ideal to which, in our opinion, policy should be directed. With that in view an attempt should be made to overcome local prejudice against federation, both by the exposition of its theoretical advantages and by testing these in practice, as soon as a suitable opportunity presents itself, through the amalgamation of some of the smaller units." In pursuance of the Commission's recommendations a Windward-Leeward Union was proposed at a Conference held in St. Kitts in 1947. It is, of course, extremely doubtful whether such an association could have provided an adequate test of the advantages of a wider union; for a Windward-Leeward Union is not a microcosm of a West Indian Federation. Opposition to the proposal came from Montserrat in the Leewards, and, with much greater force, from Grenada in the Windwards. But the federal movement was not to be stayed; before further progress could be made the pilot scheme was overtaken by the major enterprise itself.

The war years drew the West Indian colonies much closer together than they had previously been. United in the allied cause, they achieved an identity of purpose and of action which went a long way towards destroying the psychological barriers which Major Wood found so obstructive in "federating an archipelago." This in itself assisted the emotional reconciliation to federation through the

development of a West Indian consciousness, but more important still the circumstances brought home to many, who had earlier doubted, the burning need for the machinery for common action. Out of this need and its realisation, there arose a number of improvisations, all attempts in various spheres to achieve co-ordination. Of these attempts, perhaps the most important was the establishment of the Development and Welfare Organisation in 1940. Their specific task was the administration of the scheme of financial assistance from the United Kingdom Exchequer provided for in the Colonial Development and Welfare Act of 1940,⁶⁵ and inspired by the Report of the Royal Commission. In fact, their activities covered many fields and entailed much more than the term "administration" implies. Extensive research and investigation were undertaken; expert knowledge went into the production of development projects for the individual colonies; and the foundations were laid for the planned development of the Caribbean as a whole.

Side by side with the Development and Welfare Organisation there arose another regional body, admittedly less functional in its approach but certainly more far-reaching in its implications. In 1939, the United States acquired ninety-nine-year leases of areas in the British West Indies for military and naval bases. Out of the resulting co-operation in matters of defence between Britain and the United States the possibility of co-operation in other problems common to the dependencies of both countries in the area became apparent, and in March, 1942, the two Governments issued a joint communiqué announcing the creation of the Anglo-American Commission to encourage and strengthen social and economic co-operation in the area and to avoid unnecessary research. The Commission would be advisory and would concern itself with matters relating to labour, health, education, social welfare, economics and other kindred subjects. By 1945, the Governments of France and the Netherlands accepted an invitation to join the Commission, and, in 1946, it was renamed the Caribbean Commission. To co-ordinate research activities and to ensure that it acted on the best advice available the Commission created the Caribbean Research Council in 1943. This subsidiary body through its surveys, the conferences of experts which it has convened, and its publications, has been the most useful and productive organ of the Commission. In an attempt to associate the people of the Caribbean with the work of the Commission it was agreed that there should be a system of conferences attended by representatives of all the territories concerned. In pursuance of this the West Indian Conference was inaugurated. The Conference is a

⁶⁵ 3 & 4 Geo. 6, c. 40.

standing body with a permanent secretariat—reminiscent of the Davson proposals. It meets biennially and its meetings are attended by delegates appointed by each territory or group, the British colonies for this purpose sending separate delegations. The Conference is an advisory body and its real value lies in the opportunity which it provides for an exchange of views and ideas not merely among the members of the British West Indian delegations, but between them and the representatives of the French, Dutch and American dependencies. In the words of Mr. Charles W. Taussig, one of its guiding spirits, and from its inception until his death United States Co-Chairman: "For the first time in respect of non-self-governing territories there exists an international regional body devoted to economic and social action that crosses political boundaries."⁶⁶

It is not difficult to appreciate that these developments gave added vitality to the federal movement. The ramparts of separatism and prejudice had been breached; contact has produced understanding; and association has revealed how unfounded were many fears. Above all, a West Indian consciousness had developed to the point where West Indian nationalism had been born. On the other side, the inadequacies of *ad hoc* expedients born of necessity had been painfully demonstrated and a recognition of the need for federation now replaced in many minds a vague appreciation of the advantages of co-operation.

But if the experience of these years had reinforced one aspect of the case for federation it weakened it in another. Political frustration, I have suggested, had enhanced the attractions of federation. Now for the first time since the 1860s, the West Indian colonies really began to advance politically. Representative government, which was the goal of the twenties, was now firmly established. Responsible government which, even in the thirties, must have appeared largely unattainable, was by the fifties within the grasp of Barbados, Jamaica, Trinidad and British Guiana. In all but Trinidad reform of the legislature was virtually complete; universal adult suffrage prevailed in all the colonies. These developments were, in the main, the product of the war years and those which immediately followed and it is a fact of some significance that federation, which once possessed an appeal as a possible alternative to improbable local self-government, began to be suspect for that very reason. Much emphasis, therefore, was laid in recent years on the need for a guarantee that federation would not in any way prejudice political advance in the individual

⁶⁶ Quoted in the Foreword to the First Volume of *Caribbean Economic Review*, Vol. 182, December, 1949.

colonies. It was a sentiment evident in many of the speeches at Montego Bay, and the Secretary of State was there quick to reassure the Conference on the point. Nevertheless, so great was the importance attached to it that in Resolution 2, after the principle of federation had been accepted, the Conference placed its attitude on record: "Resolved: That this Conference believes that an increasing measure of responsibility should be extended to the several units of the British Caribbean territories, whole political development must be pursued as an aim in itself, without prejudice and in no way subordinate to progress towards federation." It must not be supposed, however, that political considerations no longer influenced the federal movement. They had lost some of their urgency, but they remained fundamental. The ultimate goal of West Indian political ambition is not responsible government but nationhood, and there were few who visualised its achievement on the level of the individual colonies.

PARLIAMENTARY VENTILATION OF GRIEVANCES

ARISING OUT OF THE OPERATION OF DELEGATED LEGISLATION

JOHN E. KERSELL

In a previous article we discussed one relatively neglected aspect of delegated legislation¹: in this we shall consider another.

When a Parliament has delegated power to the executive enabling it at its own discretion to make rules and regulations having the effect of law, the individual citizen who may feel himself wronged in the application of an instrument has only limited recourse to the ordinary courts of law. He has, of course, the right to appeal to them on grounds that the particular piece of delegated legislation is *ultra vires* of the enabling Act. Government draftsmen have, however, proved themselves most ingenious in phrasing grants of power so as to limit the authority of courts in this regard, and have been careful, also, not to produce instruments which go beyond the limits of the enabling legislation.

An aggrieved citizen may have, in addition, recourse to an administrative tribunal independent, to a degree at least, of the department concerned. Where the enabling statute requires such a tribunal to decide on the grievance according to facts determined by evidence and according to the law as specified in the Act itself, there is no serious problem for democracy. As argued by Professor J. A. Corry,² when the Government submits to being governed by statutory laws, it has conceded the main point with regard to the rule of law, even though the legal profession and others may not like the institutions which have been delegated judicial powers. Their constitutions, procedures and personnel can be improved. Regular courts can claim some jurisdiction over bodies exercising judicial powers, and it is possible to set up an administrative court of appeals that will earn sufficient respect. Traditional courts may not be the

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¹ Kersell, J. E., "Upper Chamber Scrutiny of Delegated Legislation," *Public Law*, Spring, 1959. That article and the present one are based on chapters from the forthcoming book *Parliamentary Supervision of Delegated Legislative Powers* by the same author, to be published by Stevens & Sons, Ltd.

² "The Prospects for the Rule of Law," *The Canadian Journal of Economics and Political Science*, November, 1955, pp. 408-409.

only institutions capable of judicial integrity, high competence and independence. The important point is that citizens should, whenever possible, be assured that disputes arising out of the operation of laws will be judged impartially on the basis of those laws which are known beforehand.

When this ideal situation cannot exist in practice, for whatever reasons, citizens should be assured that their grievances can, at very least, be ventilated, and may receive consideration on their merits. We cannot here go into all the implications of this broad generalisation, for to do so would take us into the vast vague realm of administrative decision-making and to the consideration of such fascinating but highly complex decisions and consequences as those revolving around the Crichton Down affair. We shall confine discussion here to the parliamentary avenues open for the ventilation of grievances arising out of the administration and effect of statutory instruments.

At one time the courts did claim jurisdiction over any actions that determined the rights and obligations of individuals,³ but in recent years they have come to accept that they have no jurisdiction over matters of policy—over matters of a political nature as opposed to matters of law.⁴ Professor Corry argues, and he is undoubtedly right, that this is as it should be. When Parliaments, on political grounds, delegate power to make subordinate laws on political considerations, the courts cannot intervene, for that would be flouting Parliament. Under such conditions of parliamentary sovereignty, the individual cannot have any substantial judicial protection from the authorities who administer rules and regulations which they themselves make and amend. It does not necessarily follow that the individual should not have some political protection beyond his right to vote and to influence the votes of others.

In practice, of course, there are other political recourses open to citizens aggrieved by the application and effects of statutory instruments. The effectiveness of these recourses is, however, not widely and fully known or appreciated in every instance even by people relatively close to Parliaments. As a result of this fact, the channels for airing grievances arising out of delegated legislation are not often used and little of substance is known about them.⁵ They include,

³ *R. v. Electricity Commissioners* [1924] 1 K.B. 171, and *R. v. Hendon Rural District Council* [1933] 2 K.B. 696, quoted in Corry, *op. cit.*, p. 410.

⁴ *Franklin v. Minister of Town and Country Planning* [1947] A.C. 87; *Johnson v. Minister of Health* [1947] 2 All E.R. 395; and *Earl Fitzwilliam's Wentworth Estates v. Minister of Town and Country Planning* [1951] 2 K.B. 284, quoted *ibid.*

⁵ The author has, furthermore, experienced considerable difficulty in trying to uncover additional information. Most of what follows is fairly general knowledge or was disclosed in interviews with people close to a Commonwealth Parliament.

however, the lines of communication between Members of Parliament and their constituents. By means of these, which in substance are letters and personal contacts, M.P.s learn of grievances in the first place. Correspondence and contacts act as a scoop to pick up the basic information. The processing channels into which information is then put, generally speaking, include the avenues of communication between individual M.P.s and members of the Government. In New Zealand these are mainly personal contacts, but elsewhere letters are the main means of such communication. If representations made through these less political channels are inappropriate or ineffective, parliamentary machinery is available to secure the public airing of relevant facts and views.

British question time and daily adjournment debates are undoubtedly the best known of parliamentary procedures which are appropriate to the ventilation of grievances arising out of governmental activity, but New Zealand's Parliament, using written questions and answers which are briefly debatable once a week, has established special "Public Petitions Committees" which deal largely with petitions of grievance many of which arise out of the operation of statutory regulations. All these procedures are, of course, related to lower chambers, for invariably it is to their Members of Parliament that people present their grievances for ventilation in hopes of redress.

A most important part of the British system of channels (because it is in fact one system) for ventilating grievances is the scoop that picks up the raw materials for processing. Members of Parliament in Britain have a close relationship with their constituencies. Many spend week-ends and holiday recesses with their constituency parties and with their constituents. A considerable number of M.P.s hold in their constituencies, usually on Saturdays, "surgery hours" during which they have appointments with people who wish to have their advice or assistance. The relations between the M.P. and his constituency in general, including, of course, correspondence, and the contacts made during "surgery hours" are admirably suited to picking up the grievances people of Britain may have arising out of the impact of governmental authority on their lives. While it is apparently the case that most of the things M.P.s are asked about, and to help with, are not directly related to statutory instruments, it is inevitable that many problems presented will have arisen out of the operation of delegated legislation. While problems of housing, which have probably dominated "surgery hours" since 1945, would largely be excluded from the foregoing generalisation, problems arising out of the activities of the Welfare State, such as pension problems, would fit in many instances. It can be safely assumed that if any genuine grievance to a person or persons arose

out of a statutory instrument, the grievance would be assured a sympathetic hearing from most M.P.s, and if there is justification, other channels of ventilation would be open as required.

Presented with a *prima facie* case of genuine grievance, whatever its source in the administrative process, if a Member of Parliament cannot himself redress the grievance, and he rarely if ever can, he may do one of a number of things. If the situation is appropriate and he knows the departmental official or officials concerned with the particular problem, he may write a letter directly to them telling them of the injustice their action or instrument has wrought, and asking them what can be done to remedy the situation. Satisfaction may or may not be given at this point.

If it is not, or if the Member does not know to whom to write within the department concerned, he may speak to the Minister informally, especially if he knows him well and if the problem is not too complex. In the vast majority of cases, however, Members write in the first instance directly to the responsible Minister. Such a letter is highly respected in departmental circles. It begins a process of careful investigation and consideration which is every bit as scrupulous as the process gone through in preparing answers to questions asked in the House itself.

All letters to a Minister are first screened by his private secretary, who may in certain instances send a letter directly to the appropriate branch of the department for answering. Any important matter of grievance, however, is cleared by the Minister to the proper branch, or official, along with the Minister's recommendations for handling the matter. He may ask for advice, suggest that appropriate changes be made or imply that the complaint should be diplomatically circumvented. What goes on after this and below the political level is not properly our concern here, but it is important to stress once more that great care is taken by civil servants in answering letters from Members of Parliament, for they are fully aware that if an answer is not satisfactory, there are many precedents for pressing the matter further to the political discomfort of their Minister. A point of criticism that has been directed by implication should be reported, however, and that is: departments have in the past been slow in answering letters from M.P.s. The Select Committee on Procedure reported⁶ that it would "help to reduce the number of Questions [in the House], oral and written, if departments made it a rule to answer letters from Members within a fortnight."

Because departments have at times been slow in answering letters, and because answers sometimes fail to satisfy Members and those on

⁶ British Parliamentary Paper, 58-I of 1945-46, p. v.

whose behalf they act, resort is often had to asking questions of Ministers in the House of Commons.⁷ Questions, it is generally agreed, are one of the most effective British methods of controlling and influencing the Government in what it does and how it does it. They "turn a searchlight upon every corner of the public service . . . [and are a] safeguard against negligent or arbitrary conduct, or the growth of that bureaucratic arrogance which is quite unknown in England."⁸

In order to get an answer somewhat more quickly than is likely to come from a letter to the Minister, a Member may put down a question for written answer. In the case, furthermore, of matters of purely local or individual significance, questions for written response are obviously more appropriate than oral questions. Written replies are sought by submitting questions in writing at the Table, with the day for reply specified, but without an asterisk. Such questions do not require any notice and can be put down for answer on the day following the one on which they were submitted. There is, however, no requirement for punctuality in replies to such questions and they are not treated with the same urgency as questions for oral answer. Mr. Edward Fellowes, then editor at the Table of Questions, guessed in 1945 that unstarred questions were answered within a week of the day on which they stood for answer.⁹ A type-written copy of the answer to a Member's question is sent to him by the department and other copies are circulated in the House as well as being printed in *Hansard*.

In the case of matters, including grievances arising out of statutory instruments, which have true political significance—matters of broad interest such as those involving injustice—and in the case of questions requiring expeditious answers, Members usually put down their questions for oral answer. These can be, and usually are, followed by supplementary questions. Quite frequently an oral question and inevitable supplementaries will follow receipt of an "unsatisfactory" reply to a letter: this is a second avenue of attack upon the Government. Questions are a powerful weapon available to a Member if he does not get reasonable consideration from a Minister on an important matter, of grievance or otherwise. This is especially true of Opposition Members, who frequently use oral questions merely to harry Ministers or create a row. Even they, however, will not often risk putting the backs of the Government and of departmental

⁷ About this more formal procedure by which grievances may be ventilated a good deal is known, and so we shall treat Question Time superficially here.

⁸ Lowell, A. L., *Government of England*, N.Y., The Macmillan Co., 1929, vol. i, p. 332.

⁹ British Parliamentary Paper, 58-I of 1945-46, p. 2.

officials up by asking a question before seeking accommodation of a constituent's grievance through less formal and less public channels.

Questions for oral answer are also submitted at the Table, but are starred with an asterisk. A Clerk Assistant edits all questions and if any appear out of order, they are referred to the Speaker for a ruling. Once cleared, questions are sent by hand to the appropriate department or departments for answer. Replies must be made punctually on the day for which they are put down by the Member. The House meets at 2.30 p.m. each sitting day, and if there is no Unopposed Business, question time begins directly but not later than 2.45. Oral questions may be asked until 3.30. Questions may be put down for oral answer on Fridays, but they being Private Members days, Ministers are not obliged to be present to answer.

When Question Time begins, Mr. Speaker calls the name of the Member whose question appears first on the Order Paper, and the Member rises to state only the number of his question. The Minister who is answering reads his reply or, if it is of great length, asks to circulate it with *Hansard*. The Member asking the original question, or any other Member, is entitled to ask a supplementary question or questions arising out of the original one or out of the reply to it. Whereas answers to questions appearing on the Order Paper are prepared by departmental officials, answers to supplementaries have to be given on the spur of the moment. Ministers are, of course, briefed not only on the answer to the original question but also on the answers to probable supplementaries. Furthermore, if the inquisition is expected to be particularly strenuous, a civil servant is in the official box with his files, ready to pass additional information to the Minister. Success, however, usually depends on rapidity of response, and so the Minister often must answer from memory. Faced not by one inquisitor, but by what Sir Ivor Jennings termed "serried ranks of critics,"¹⁰ the Minister may well be forced to disclose information indicating the nature and extent of any injustices that may exist.

From what has been said so far, the importance especially of oral questioning as a technique for ventilating grievances can be appreciated. Often this effect is gained less subtly, for questions such as: "Is the Minister aware that . . . and does he propose to take steps to deal with the matter?" are not uncommon. Question Time also has a preventive effect. It compels Government officials to be circumspect in all their actions, and thereby tends to forestall petty injustices commonly associated with bureaucracy. It compels the administrator to pay attention to individual grievances, usually at

¹⁰ Jennings, Sir Ivor, *Parliament*. 2nd ed., Cambridge University Press, 1957, p. 107.

an earlier stage than formal questioning. If this is not the case, an attack in the House of Commons is inevitable, and yet it is the first duty of a civil servant to protect his Minister. It has been said ¹¹ that Question Time "is dreaded more than any other hour by the civil servants, and it keeps them up to the mark much better than any other way which anybody could suggest." This must be just as true in regard to the administration of statutory instruments.

It would be a tedious and disproportionately unrewarding task to analyse even a cross-section of questions asked in Parliament in an effort to determine how many may have arisen indirectly out of statutory instruments and their effects, but it may be guessed that there must be a significant proportion, especially since the inauguration of the Welfare State. Indicative of this is the number of questions directly related to the subject of statutory instruments and indexed in *Hansard* under that heading. There was even a question for written answer asked in the House of Lords. In the House of Commons, between the end of World War II and the end of the 1956-57 session there were 129 questions about statutory instruments asked for written replies, and 93 asked for oral answers.¹² While these are not high figures, they are significant of the use Members could make of question time.

Written questions, for the most part, seem to seek information only, and that is, of course, their proper function. Many M.P.s in fact often seek an oral answer for questions eliciting information simply to have an answer sooner, but it is highly unlikely that questions for written answer would ever be asked by way of ventilating a grievance. The important questions for our purposes are the ones for oral reply.

Many questions on statutory instruments as such seem to have arisen from some genuine or supposed grievance,¹³ but a survey of the questions asked since the end of World War II would include a number of questions asked, it is fairly obvious, out of scepticism and antipathy. Many members of the Opposition during the years 1945 to 1951 felt some sympathy for those groups and interests, especially business, which experienced considerable frustration due to the operation and effects of the Government's subordinate legislation. This led some to the attack of the whole system of rules and regulations by which the Labour Government was trying to change the face and foundations of British society. Especially during 1950 and 1951 this attack included what may be termed desperate tactics. In

¹¹ Quoted *ibid.*, p. 104.

¹² These figures were derived from the indices to *Hansard*, and so there may have been some oversights.

¹³ For example, see British House of Commons Debates, Vol. 511, col. 28; Vol. 520, col. 1889; Vol. 521, col. 2172; and Vol. 529, cols. 236-237.

regard to questions asked during this period one finds the same sort of legalism and hair-splitting (which involves exhausting effort to deal with) that typifies prayers of the period. The result for question time, it is submitted, was to distort the ordinary function and effects of questions on statutory instruments even more fundamentally than were the function and effects of prayers. Instead of questions being used as means to ventilate grievances of citizens, through many of the post-war years they have been used (more exclusively than prayers) as another means by which to harass the Government. This does not mean that there was not at root a vast number of genuine or supposed grievances. It means, rather, that instead of these being aired each on their own merits, they were aired, as it were, in a steady and fairly concentrated blast directed against the whole system of "frustrating" rules and regulations, and, perhaps it is fair to conclude, against socialism itself. Even after the Labour Government had been displaced, Members of Parliament still asked whether "Her Majesty's Government will take steps progressively to reduce the number of Statutory Rules and Regulations."¹⁴

These facts and deductions might well indicate the high political significance a grievance or grievances must have to command a hearing at question time. As we shall see this is almost the last appeal, and most minor grievances are undoubtedly settled one way or another before this extreme is reached. Things of greater general political significance are the meat of most question hours. In fact, then, it may be no surprise that since the 1953-54 session of Parliament there have been no questions asked on matters arising directly out of delegated legislation. This does not mean, needless to say, that there would not be a question if an individual's grievance were ignored at an earlier stage in a Member's pursuit of justice for a constituent.

The effectiveness of question time is just as subtle as the effectiveness of scrutiny or debate.¹⁵ In no instance since 1945 has a Minister made any meaningful concession in replying to questions arising directly out of statutory instruments. Perhaps this can be accounted for in the nature of the issues involved, and of the questions asked. Ministers, armed with the briefs of expert civil servants and with the skill of accomplished Parliamentarians, are especially facile at saying very little at great length, "in a bland and confidential manner"—to quote Sir Ivor Jennings.¹⁶ And yet question time,

¹⁴ *Ibid.*, Vol. 498, col. 1409. When this question was asked in April, 1952, much had already been done to reduce the incidence of delegated legislation, but the fact that it was asked is indicative of the preoccupation of many Conservative back-benchers.

¹⁵ See Kersell, J. E., *Parliamentary Supervision of Delegated Legislative Powers* (note 1, above). ¹⁶ *Op. cit.*, p. 107.

more than any other control exercised by Parliament, is particularly effective in preventing minor oppressions which often weigh most heavily upon one or a few individuals.

A further parliamentary appeal that Members can make on behalf of an aggrieved citizen is in debate on the motion to adjourn. Quite frequently the daily half-hour debates are used to raise again grievances that have not been satisfactorily dealt with following a letter to the Minister or a question in the House. In actuality debate is a better technique for ventilating grievances than are questions and supplementaries. It gives a much better opportunity to develop the facts and to hear the Minister's reasoned reply. The opportunities are, of course, more restricted, there being a maximum of five adjournment debates per week while as many as 300 questions might be reached during the four certain question periods of a week. Adjournment debates, most of which take place late in the evening, have the added disadvantage of not being reported very often in the press, so Members do not get the publicity they might frequently desire. Nevertheless, they do permit the raising of issues that cannot be adequately dealt with by a question, and they do provide another appeal from unsatisfactory replies to questions.

We have no particular example of an adjournment debate revolving about a statutory instrument, but a casual reading of any such debates again indicates how rare it is that a Minister will commit himself to do more than investigate the grievances complained of. The real effect is intangible—that on the administrator called upon to make a decision which might get his Minister into difficulty with Parliament.

A final recourse that may be had if a Member is unable to gain satisfaction earlier is to raise an issue of grievance in Committee of Supply by moving an amendment reducing a related vote or item by £100. This procedure has the effect of bringing under critical review the policy of the Government as revealed by that vote or item, and the mover would then be in order to expound the grievance of a constituent who may have received less (or more) than justice from the officials of a department. Amongst those subjects open to debate in Committee of Supply is administrative action of a department including, by implication, action taken by or under delegated legislation.¹⁷

¹⁷ It is the case, however, that actions of high public servants, whose conduct can only be criticised upon substantive motions, cannot be debated in Committee of Supply. This leaves the impression that debate on the adjournment, which is precipitated by a substantive motion would be preferred to debate in Committee of Supply, not only because it is more immediately available, but also because it is a more flexible type of debate. If a Member waited for a Supply day to raise a grievance, he might be told by the Minister that the action complained of

From what has been said to this point it may be concluded that individual grievances, even if they are genuine, are not necessarily redressed if they are aired at question time, on the daily adjournment or in Committee of Supply. Although the Minister may equivocate in a reply or in debate, however, it does not follow that the particular grievance in question *will not* be redressed. The Minister must protect his civil servants, and if he cannot justify or at least rationalise their actions, he must undertake in Parliament to discipline them in an appropriate manner. This may happen in any event, but in most instances Parliament and the public should not be in on the reprimand. Furthermore, in most cases genuine wrongs are probably quietly put right by administrative action after the Minister has "investigated." As the system now works, however, redress of genuine grievances is not assured, politically or otherwise. All is left to the uncompromised discretion of busy Ministers and officials. The political machinery is more effective in preventing injustice than securing redress. There is no parliamentary procedure by which evidence can be sifted and recommendations made.

In his memorandum to the Davies Committee on Delegated Legislation Mr. E. A. Fellowes, now Clerk of the House of Commons, suggested that "the present procedure of the House lays too much emphasis on 'prevention' and not enough on 'cure'."¹⁸ He went on: "I venture to think that this is wrong and that some procedure ought to be evolved to enable anyone 'peculiarly aggrieved' by the operation of a Statutory Instrument or any decision of a department from which there is no appeal to the courts, to resort to the House of Commons." He laid stress on the word "peculiarly" so as to make it quite clear that the political issues, settled when the statutory instrument was approved or during the forty days during which it might have been prayed against, should never be reopened. Nor should political "stunts," the possible range and nature of which can easily be imagined, be encouraged.

The remedy suggested by Mr. Fellowes was "a petition for redress of grievances" the procedure for which could be established in Standing Orders. A petition itself would allege damage suffered by the petitioner either as an individual or as a member of a group, and not suffered by the majority of citizens. It would have to be

was taken by some high official and be, therefore, ruled out of order. Such a reply by a Minister might, however, tempt a Member, especially if he is in Opposition, to get a Motion of Censure put down against the Government, for these are "substantive." But British Governments will have to change their natures radically before such extremes of insensitivity to parliamentary unrest develop. No Government is likely to ignore a grievance until, in desperation, the challenge of a Vote of Censure is thrown down.

¹⁸ British Parliamentary Paper 310-I of 1952-53, p. 90.

shown that this damage resulted from a statutory instrument or a departmental decision from which there was not appeal to the courts. The petition would conclude with a "prayer" for redress. As a safeguard against "stunt" petitions Standing Orders might, it was suggested, provide that the petition should be accompanied by a monetary deposit, part or all of which would be forfeit under certain circumstances. Thus, householders would be discouraged from petitioning against a change in building requirements, while contractors who had a *prima facie* case to support a petition against a similar order on grounds that the regulations were not sound from the economic point of view, might proceed with impunity.

Petitions for redress of grievances could be heard by small committees of three or four Members appropriately chosen by the Speaker and using whatever methods they thought fit. The committee could be given power to hear witnesses but not counsel or agents. They would report to the House recommending either no action on a petition (with or without some forfeit of the deposit), or steps towards remedy of the grievance. Recommendations that no action be taken, Mr. Fellowes suggested, would not be debatable except if a Member chose to raise the matter on an adjournment or in a Private Member's motion. If some forfeit was recommended, Standing Orders might provide an opportunity for a debate on a motion to agree with the report. If action were recommended, it could be taken by an Address to Her Majesty praying Her to redress the grievance.

The passage of such an Address, which might be secured as exempted business or during a morning sitting, would, of course, have a far more limited effect than an Address praying for annulment, but nevertheless the fact that appeals were open to Parliament if not to the courts would undoubtedly give people more confidence in delegated legislation. At very least it would provide another effective constitutional guarantee to the liberty of individual citizens where now there is only a political guarantee which may not be invoked in particular instances for one of several reasons. Many people probably do not know that their M.P.s can help them battle against unjust effects of rules and regulations and partisan supporters of unsuccessful candidates may accept injustices of tolerable proportions without approaching their M.P.s. In any event, once a genuine grievance appeared, there should be an established procedure for the House of Commons to hear about it. As Mr. Fellowes argued, publicity is in itself a safeguard against abuse, and the threat of it is most effective in disposing the agents of government to caution.¹⁹

¹⁹ Petitions might, of course, be made to the House of Commons when grievances arose out of Governmental action other than by statutory instrument. When administrative decisions unjustly affected personal property or personal liberty,

Despite the fact that the Chairman, Mr. Clement Davies, and another member of the Select Committee on Delegated Legislation, Mr. F. J. Erroll, both expressed a degree of enthusiasm about Mr. Fellowes' proposals for redress of grievances,²⁰ the Committee's Report summarily dismissed the entire suggestion on the grounds that "very great care is exercised by Ministers and their Departments in preparing and presenting to Parliament both the enabling Bill and the Statutory Instruments made under it when it becomes an Act" and "Aggrieved persons have their grievances brought to the attention of the House by Members."²¹ The Committee, therefore, concluded that it was not necessary to establish any new procedure for lodging and hearing grievances.

From a reading of the oral evidence, it would appear that the telling criticism of the proposals was that from the previous six years no one on the Committee, nor Mr. Fellowes, could recall any case of practical grievance which could have been dealt with by the proposed system had it been in use. To this Mr. Fellowes replied: "I cannot help feeling that people would be quieter in their minds if they knew there was a procedure by which their grievances could be remedied. I think we would hear less of the complaints against delegated legislation, and particularly delegated legislation from which there is no appeal to the courts, if in those cases an appeal lay to the House of Commons. If it would not give much more work, there is all the more to be said, I think, for having it."²² This rebuttal appears to be unanswerable.

It may be pointed out that the right of petitioning the Crown and Parliament for redress of grievances is one of the fundamental principles of the British constitution which has been exercised from very early times. But petitions, as they have developed since the seventeenth century when Parliament came to be regarded as a political and legislative body, now deal almost exclusively with public as opposed to individual grievances, and pray, usually, for an alteration of the general law rather than the redress of particular wrongs. There is no precedent for the use of public petitions procedure to ventilate a grievance arising out of the operation of a statutory

even where a decision was preceded by a departmental public inquiry, petition might be open to the House of Commons, especially if there was no appeal open to the courts. See *ibid.*, p. 96. The existence of a procedure such as the one proposed by Mr. Fellowes might have forestalled the Crichton Down affair, or had it developed regardless, might have brought it to a happier issue, at least for the Minister. Cf. Mr. Fellowes' suggestion and the New Zealand Public Petitions Committee procedure outlined below.

²⁰ Mr. Davies termed them "very good" (*ibid.*, p. 94), and attractive (*ibid.*, p. 95), while Mr. Erroll said he was "very interested" (*ibid.*, p. 101).

²¹ *Ibid.*, p. xxxii.

²² *Ibid.*, p. 101.

instrument. Hence the relevance of Mr. Fellowes' recommendation and the strength of its appeal.

The ventilation of grievances in other British Commonwealth Parliaments follows much the same pattern as has developed in the Mother of Parliaments with two interesting New Zealand exceptions. In Wellington all questions except those asked on the ground of urgency in the public interest are for written answer only, but there is no rule that questions cannot be debated. Indeed, New Zealand Standing Orders provide that when "written Replies have been circulated, any Member may, on the day [each Wednesday] on which they are given, move the adjournment of the House for the purpose of discussing such Replies. Discussion shall be confined to the subject-matter of any Questions asked or Replies given that day, and no speech shall exceed five minutes in length, or ten minutes in the case of a Minister, or the Leader of the Opposition, and unless the House otherwise agrees, the whole discussion shall not exceed two hours."²³ Debate is limited a bit further by the practice that no Member is allowed to speak a second time until all who wish to have spoken, but even so the procedure appears to be an effective one for the ventilation of grievances whether or not they arise out of statutory regulations.²⁴ If there happens to appear some glaring injustice unreasonably set aside by a written answer, the Minister will have to deal more than once that afternoon with an indignant or irate Member, and will be disposed to greater flexibility on the next occasion even if he does not give way under the pressure of the day.

As in the British Parliament, questions are not the last resort of a Member seeking to gain some measure of political adjustment for aggrieved citizens in New Zealand. There are still Committee of Supply, and in the New Zealand instance, petition.²⁵ Procedure in Committee of Supply is much the same as in Britain, for general parliamentary procedure in New Zealand is also patterned on that of Westminster. There is the interesting contrast, however, in New Zealand procedure on petitions. In Britain petitions are presented for the most part to secure redress of general grievances and may not be too impressive unless accompanied by a large number of signatures. In New Zealand, by contrast, petitions generally deal with particular grievances of individual citizens. There are many

²³ New Zealand, *Standing Orders of the House of Representatives Relating to Public Business*, Wellington, Government Printer, 1951, S.O. 80.

²⁴ There have, in fact, been only three questions relating to statutory regulations asked in the House since the end of the War: one in each of the 1948, 1952 and 1955 sessions. The two latter questions were followed up in the ensuing debate on motion to adjourn, the question and reply of 1952 evoking comment from two Members.

²⁵ In New Zealand, as in Canada, there is no debate on the daily adjournment.

examples of petitions having only one signature seeking relief from such provisions as those concerning succession duties and import duties. There are almost as many seeking adjustments in social welfare benefits and licensing requirements. A New Zealand M.P. might, therefore, recommend to a constituent aggrieved by the effects of a statutory regulation that recourse should be had to petition.

Thus, particular grievances are the subject of petitions in New Zealand and as such are passed to one or other of two Public Petitions Committees each consisting of ten members appointed to consider and report on petitions. One Committee considers, on their merits, petitions classified by the Clerk of the House as falling within subjects A to L, and the other Committee takes subjects M to Z.²⁶ Each Public Petitions Committee is ordered "to classify and prepare abstracts of such petitions in such form and manner as shall appear to it best suited to convey to the House all requisite information respecting their contents, and to report the same from time to time to the House, and to have power to report its opinions and observations thereon to the House. . . ." ²⁷ The Committees may make no recommendation, or recommend that the petition (a) be rejected (rare); (b) be referred to the Government for (i) consideration, (ii) favourable consideration, or (iii) most favourable consideration; or (c) they may recommend that the petition be granted in whole or in part.

Regardless of the recommendations made by the Committees few grievances are remedied. The usual reasons for this fact are, first, that there frequently is inadequate consideration of the grievances and relevant known facts in committee and, second, the Committees do not always have all the facts which the Government must consider. This latter point is emphasised by the Committee's own admissions of limitations implied in frequent reports that "The Committee has no recommendation to make." When a Government is, however, convinced that a grievance is justified, it may go to great lengths to remedy it. There is one example of a true heir not legally adopted being granted his petition to take possession of his bequest despite the legal oversight. In this instance, an indisputable legal provision was boldly ignored to remedy a genuine grievance. There is another example of the effectiveness of petitions. In 1945 a Private Act was passed to authorise the Supreme Court of New Zealand to vary the trusts of the will of one John Duncan McGruer who was deemed to be in need of such provision after he had entered a petition.

Even when a Committee's recommendation is not implemented, a petitioner may enter another petition praying for effect to be given to

²⁶ The Committees are known as the A to L, and M to Z, Committees.

²⁷ New Zealand Parliamentary Paper I.1 of 1956 (or any year), p. 2.

the recommendation. Thus, public petition procedure can be a most effective means in New Zealand of ventilating grievances in Parliament and, even, of gaining some measure of redress. Though instances which have directly involved statutory regulations are rare, they need not be, and there are innumerable examples of petitions, which undoubtedly have their origins in the operation of regulations and which, if remedied, imply amendments to regulations or at least changes in the way regulations are administered. It is, furthermore, reasonably certain that no New Zealand Government could indefinitely ignore a sound petition and a strong recommendation from one of the Public Petitions Committees. Nor, apparently, have they been disposed to do so.

Public Petitions may be reviewed not only by the Public Petitions Committees but also by any of the Committees of the New Zealand Parliament. While it would be terribly difficult to trace petitions so reviewed one example might be cited. In 1950 one W. P. Bray and eleven others petitioned Parliament regarding a grievance arising out of the operation of the Honey Marketing Regulations of 1938, praying for their repeal. This petition was referred to the House Agricultural and Pastoral Committee which reported a recommendation for amendment. The Committee report was then referred to the Government for consideration, and the regulations were subsequently amended.

This New Zealand petition procedure is interestingly similar in conception and effect to that suggested for the British House of Commons by Mr. E. A. Fellowes in 1953. Its workability and usefulness in New Zealand suggests that a similar procedure might work in any Parliament to the benefit of the rights and privileges of individual citizens. British problems arising out of the exercise of delegated legislative powers are, admittedly, on a different scale of dimensions and complexity than are New Zealand problems. Hence, initially at least, it is realistic to accept the limitations, unimposed in the New Zealand practice, which Mr. Fellowes suggested. Petitions would probably have to be refused if they did not meet some test of "peculiar grievance" resulting from the operation of a statutory instrument. The British Parliament is not likely to accept experimentation on a broader front than delegated legislation. To exclude all but "peculiar grievances" would ensure that political issues settled shortly after an instrument was put into operation, or at most forty days after, would not be reopened. Properly enough, petition procedure would be available only in the case of instruments or decisions made under them which were not subject to appeal in the courts. A monetary deposit, part or all of which would be subject to forfeiture under certain conditions, might well accompany the

submission of petitions as a safeguard against political or other "stunts."

Small committees could consider petitions of grievance and even hear witnesses. They could make appropriate reports to the House of Commons which would form, at least in the case of positive recommendations, the basis for debate after 10 p.m. or at morning sittings. If the House wished to seek redress, it could divide on an Address to the Queen praying Her to make such redress.

The fact that appeals were open to Parliament when they were not open to the courts would undoubtedly give people greater confidence in delegated legislation. That the procedure would, perhaps, not often be used is no argument against it. The most important effects of parliamentary supervision of the use of sub-legislative powers is the disposition to caution which it imparts to the agents of government. Herein lies the subtle but effective guarantee to liberty of the citizen in a positive State—a State in which government is called upon to do so much for the citizen. In Britain there are effective parliamentary means for the discovery and ventilation of grievances. There ought also to be effective means of assuring, in appropriate cases, that their details will be fully explored and considered.

It is the opinion of the Autonomous Section of Secretaries General of Parliaments that "when for various reasons the judiciary has been unable or is not competent to protect the individual subject against personal and peculiar damage resulting from a piece of delegated legislation, the rules of the legislature should permit of any aggrieved person having access (*e.g.*, by petition) to a special organ of the legislature charged with the investigation of such grievances but invested with powers designed to discourage the frivolous or obstructive use of its services."²⁸

The results of this study indicate that these principles can be implemented under appropriate conditions which are likely to prevail in Commonwealth Parliaments. The New Zealand Parliament has for many years had a general petition procedure appropriate to the seeking of redress of grievances regardless of their source. This procedure is open to any person without risk of penalty for frivolity or other abuse. While final action is left to the Government, it is bound to heed any strong current of opinion in Parliament. Judging by the number and content of petitions submitted each year, the people of New Zealand seem to have faith in the procedure, and do not hesitate to use it, as they might if there were risk of arbitrary or conditional penalties. Even without these there seems to be little serious abuse.

²⁸ "Delegated Legislation," *Constitutional and Parliamentary Information*, April, 1957, p. 92.

The recommendations of the Autonomous Section of Secretaries General of Parliaments were probably made in the light of proposals emanating from those made in Britain by Mr. E. A. Fellowes, who also indicated the main advantage that might be realised if an adequate redress procedure were implemented. People would undoubtedly look on delegated legislation with fewer misgivings if, in instances where appeal to the courts is not available, appeal to the original delegator were allowed on limited grounds. This is not unimportant in the case of delegated legislative powers which have been the subject of so much polemical writing ever since 1929.

There is nothing inadequate about the opportunities afforded by most Commonwealth Parliaments for presenting grievances to elected representatives, though, it is true, people do not take these opportunities as often as they might if in every instance they could be sure ventilation procedures would be as effective as British question time and daily adjournment debates, and redress procedures would be as potentially effective as those in New Zealand. An amalgam of these two types of grievance procedures with any appropriate procedure for discovery would approach the ideal of the best practicable procedure for protecting the individual against grievous arbitrary application of governmental authority in general, and of subordinate legislation in particular.

CURRENT SURVEY

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This digest, which has been compiled by the Editor, covers the period from January 1, 1959, to March 31, 1959.

UNITED KINGDOM

AGRICULTURE

Agriculture Act, 1958

Appointed day. The Agriculture Act, 1958 (Appointed Day) (England and Wales) Order, 1959, has been made.

The Agriculture Act, 1958, provides that certain of its provisions shall come into operation on the appointed day. This Order fixes the appointed day, in relation to England and Wales, as January 26, 1959, and has the effect of bringing into operation on that date all the provisions of the Act, other than those which came into force on August 1, 1958, the date on which the Act received the Royal Assent (S.I. 1959 No. 80).

Annual review

The annual review and determination of guarantees for 1959 have been published (Cmnd. 696; see also 602 H.C. Deb. 632-638; 215 H.L. Deb. 96-100, March 19, 1959).

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 192).

COURTS

County courts

The County Courts Act, 1959 (7 & 8 Eliz. 2, c. 22) received the Royal Assent on March 25, 1959. This Act consolidates, with corrections and improvements, certain enactments relating to county courts.

Legal aid and advice

The Legal Aid and Advice Act, 1949 (Commencement No. 6) Order, 1959, brings into operation on March 2, 1959, provisions enabling the introduction of a scheme for making oral legal advice available in England and Wales to persons of modest means (S.I. 1959 No. 46; for Scotland, see S.I. 1959 No. 173).

The Legal Advice Regulations, 1959, make provision for the giving of legal advice by solicitors in ordinary practice to persons with capital of not more than £75 and income of not more than £4 10s. 0d. in the week preceding the application for legal advice. In computing capital, the value of the applicant's dwelling-house, furniture and certain other articles is to be left out of account, and deductions are to be made in computing income in respect of dependants, income tax, national insurance and other contributions. Unless the applicant or his spouse is in receipt of national assistance, he will be required to pay 2s. 6d. for the legal advice he gets and the solicitor giving it will normally be entitled to £1 for every half-hour spent giving it up to a maximum of £3. Special arrangements are made for the case in which legal advice is required for longer than one hour and

a half. Provision is made for dealing with vexatious applicants and those making false statements (S.I. 1959 No. 47; for Scotland, see S.I. 1959 No. 174).

Reports. The 8th annual report of the Law Society on the operation and finance of Part I of the Legal Aid and Advice Act, 1949, has been published, with the comments and recommendations of the Advisory Committee, by the Lord Chancellor's Department. For debate on the recommendation in the 7th annual report about the limits of disposable income, see 600 H.C. Deb. 959-1018, February 24, 1959 (see also 602 H.C. Deb. 176, March 17, 1959).

CROWN PROCEEDINGS

Action against servant barred

No bar to action against Crown. C. sued B., an official at the Labour Exchange, for assault, and joined the Ministry as defendants. A previous action by C. against B. in the Stipendiary Magistrates' Court had been dismissed. B. had a certificate of dismissal under section 45 of the Offences against the Person Act, 1861, and successfully pleaded this in bar of C.'s action. C. continued the action against the Ministry, who raised as a preliminary point that the proviso to section 2 (1) of the Crown Proceedings Act, 1947, "no proceedings shall lie against the Crown . . . in respect of any act or omission of any servant or agent of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant . . .," operated to bar any action against themselves also. Judge McKee held that the proviso meant what it said, and was not to be read "unless proceedings would also lie against the servant." When a servant commits a deed which gives rise to an action at the time of the deed, if the Crown is master, it is liable even though proceedings against the servant become barred. The case was then heard on its merits and judgment given for the defendants: CORNEY v. MINISTER OF LABOUR (Cty. Ct.).

GOVERNMENT FUNCTIONS AND APPOINTMENTS

Civil Service

Remuneration. A Treasury Minute has been published concerning provision in a single supplementary estimate of sums required to effect payment of arrears of Civil Service remuneration (Cmnd. 682).

The results of the review of the Advisory Committee on the Pay of the Higher Civil Service (Chairman: Lord Coleraine) have been published, with its recommendations (599 H.C. Deb. 242-244, February 12, 1959).

Documents

Crown privilege. On January 20, 1959, the Attorney-General refused a request that he should set up a committee to review the existing state of the law (598 H.C. Deb. 19-20). On January 27, 1959, he gave a similar refusal when a question was raised on *Auten v. Rayner* (598 H.C. Deb. 855-856).

Ministers' Functions

Defence. The Minister of Defence stated that the membership of the Defence Administration Committee comprised the Permanent Secretaries of the Service Departments and Ministry of Supply under the chairmanship of the Permanent Secretary of the Ministry of Defence. Service members of the Board of Admiralty and the Army and Air Councils attended when matters affecting their responsibilities were being considered. Its functions were to consider methods for improving efficiency and for securing economies by closer co-ordination between the Services in the field of administration and supply, and to arrange as necessary for the detailed investigation of specific issues (601 H.C. Deb. 82-83, March 9, 1959).

Education. On January 22, 1959, the House of Commons debated the Command Paper on Secondary Education for All (Cmnd. 604).

The report of the Chief Medical Officer of the Ministry of Education for England and Wales for 1956 and 1957 also reviewed fifty years of the School Health Service (H.M.S.O. 27-71-0-57).

On February 26, 1959, the House of Lords debated Secondary Education with particular reference to selection at the age of 11-plus and the comprehensive system of education (214 H.L. Deb. 544-645).

Power. On January 21, 1959, the House of Lords debated the national fuel and power policy (213 H.L. Deb. 645-700).

On February 6, 1959, the House of Commons debated the same subject (599 H.C. Deb. 727-820).

Inland Revenue Commissioners. The report for 1957-58 has been published (Cmnd. 628).

Transport. The statistics for Great Britain for 1957-58 for Public Road Passenger Transport have been published (H.M.S.O. 55-325-0-58).

Police

Metropolitan police. On January 20, 1959, the House of Commons debated, on the adjournment, police arrangements for the Orpington district (598 H.C. Deb. 163-170).

Select Committee on Estimates. On February 20, 1959, the House of Commons debated the 1st Report (1957-58) of the Select Committee (600 H.C. Deb. 755-778).

Waters. On several occasions, the House of Commons considered the case of John Waters, a boy of fifteen, who was alleged to have been assaulted by police constables (see 599 H.C. Deb. 349-358, February 3, 1959; 982-988, February 10, 1959; 600 H.C. Deb. 31-34, February 16, 1959; 204-228, February 17, 1959, when it was moved that a Tribunal be set up under the Tribunals of Inquiry (Evidence) Act, 1921; 548-549, February 19, 1959; see also 214 H.L. Deb. 344-362, February 18, 1959).

Tribunals of Inquiry

The list has been published of all the inquiries instituted under the Tribunals of Inquiry (Evidence) Act, 1921, since its inception (600 H.C. Deb. 203-204, February 27, 1959).

See also WALES (below, p. 193).

HIGHWAYS

Committee

Report. The Committee on consolidation of highway law has published its report (Cmnd. 630). Its terms of reference extended beyond mere consolidation as does the Highways Bill whose draft was forwarded to the Ministers by the Committee. The Bill was published (H.L. (40)) in January, 1959, and received its second reading on January 27, 1959, and referred to a joint Committee of both Houses (213 H.L. Deb. 863-869).

INQUIRIES

Transport

Air. The reports have been published (a) of the public inquiry into the causes and circumstances of an accident on February 27, 1958, to Bristol Aircraft G-AICS (C.A.P. 152 dated July 29, 1958); (b) by the Federal Republic of Germany relating to the inquiry into the accident to G-ALZU AS 57 Ambassador (Elizabethan) on February 6, 1958, at Munich-Riem Airport

(C.A.P. 153 dated January 31, 1959); (c) on the accident to Viscount Type 802 G-AORC on April 28, 1958 (C.A.P. 154).

Railway. The reports have been published (a) on the derailment on August 12, 1958, at Borough Market Junction (dated November 4, 1958); (b) on the collision on July 4, 1958, at Maze Hill (dated December 19, 1958); (c) on the electrical fire on July 28, 1958, between Shepherds Bush and Holland Park (dated November 17, 1958); (d) on the collision on September 2, 1958, near Lunan Bay (dated December 15, 1958); (e) on the collision on August 25, 1958, at Eastbourne Station (dated January 16, 1959).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 170).

LOCAL GOVERNMENT

Children

In care. Particulars have been published of the number of children in the care of local authorities under the Children Act, 1948, the manner of their accommodation and the estimated costs of maintenance; and the number of children in registered voluntary homes or boarded out by voluntary organisations (Cmnd. 632).

Education

Libraries. The report has been published of the Committee on the structure of the public library service (Chairman: Sir S. Roberts). The Committee recommends that only the larger local authorities, with adequate finance, should have library responsibilities (Cmnd. 660).

Salaries. The Remuneration of Teachers (Primary and Secondary Schools) Amending Order, 1959, provides that the remuneration paid by Local Education Authorities to teachers employed in Primary and Secondary Schools shall be increased by 5 per cent. from February 1, 1959 (S.I. 1959 No. 148).

Scotland. The Scottish Education Department has issued a circular on the Local Government and Miscellaneous Financial Provisions (Scotland) Act, 1958 (Circular No. 396).

Elections

The Rural District Council Election Rules, 1959, amend the Rural District Council Election Rules, 1951. Rule 1 revokes certain provisions which are now unnecessary in consequence of the Local Government Elections Act, 1956 (4 & 5 Eliz. 2, c. 43), which provided for the synchronisation of rural district and parish council elections. Rule 2 amends the existing rule by providing that, where rural district and parish council elections are held together, any extension of the hours of poll for one election shall apply equally to the other election (S.I. 1959 No. 430).

The Parish Council Election Rules, 1959, amend the Parish Council Election Rules, 1952. Rule 1 revokes certain provisions which are now unnecessary in consequence of the Local Government Elections Act, 1956 (4 & 5 Eliz. 2, c. 43), which provided for the synchronisation of rural district and parish council elections. Rule 2 amends the existing rule by providing that, where rural district and parish council elections are held together, the hours of poll for the two elections shall be the same (S.I. 1959 No. 431).

Finance

Borrowing. The accounts have been published of receipts and payments by the National Debt Commissioners in respect of the capital and income of the Local Loans Fund for 1957-58, together with the report of the Comptroller and Auditor General thereon (H.C. 88 of 1958-59).

The Economic Secretary to the Treasury stated that net borrowings by local authorities in the United Kingdom for capital purposes in 1957-58 (less repayments and less lending by local authorities to persons) was estimated at £376m. made up as follows:

	£ million
Public Works Loan Board	33
Government Loans Fund (Northern Ireland)	6
New stock issues	39
Borrowing from superannuation funds, etc.	25
Other borrowing (mortgages, bonds, etc.)	273

Other sources of funds for capital investment were Government grants (£24m.) and the current surplus on revenue account, before providing for depreciation and stock appreciation (£170m.) (601 H.C. Deb. 60-61, March 5, 1959).

The rates of interest on loans advanced to local authorities from the Local Loans Fund from March 28, 1959, are: 5 per cent. for periods up to five years; 5½ per cent. for periods of more than five years (S.I. 1959 No. 574 revoking S.I. 1958 No. 1766; see also 602 H.C. Deb. 151, March 26, 1959).

Grants. The Ministry of Housing and Local Government has issued Circular No. 22/59 dated March 12, 1959, stating that the Ministry is prepared to consider making a grant towards the cost of water and sewerage services needed for a substantial new industrial development in these parts of the development areas where there is high unemployment. The local authority must be able to show that it cannot reasonably meet the full cost of these services from its own resources. The Ministry is also prepared to consider applications from local authorities in the same areas for help towards improving the standard of their water and sewerage services. The grants would be paid under the powers of the Distribution of Industry Act, 1945. The Circular detailing the new arrangements also refers to the announcement that the Board of Trade are now prepared to consider making grants under the Distribution of Industry Act of up to 75 per cent. of the agreed cost of reclaiming derelict land in development areas, provided that the work is to be completed by March 31, 1960.

The Rate-Product (County Borough) Rules, 1959, provide for the determination of the product of a rate of one penny in the pound for any county borough, for the purpose of the general grants under the Local Government Act, 1958, and the Rate-deficiency Grants under section 2 of the Local Government Act, 1948, and sections 5 to 7 of the Act of 1958 for 1959-60 and subsequent years (S.I. 1959 No. 259).

The Handicapped Pupils (Boarding) Regulations, 1959, replace the regulations which prescribe the conditions for grant to local education authorities in respect of handicapped pupils boarded by them otherwise than at boarding schools, viz., Part IV of the School Health Service and Handicapped Pupils Regulations, 1953 (S.I. 1953/1156: 1953, I, p. 613), revoked by the Special Schools and Establishments (Grant) Regulations, 1959 (S.I. 1959/366). The regulations are no longer grant regulations and considerable modifications have been made in the Minister's requirements: provisions requiring his approval of boarding homes, and enabling him to impose specific conditions as to the number and classes of pupils to be boarded there, have been omitted (S.I. 1959 No. 362).

The School Health Service Regulations, 1959, replace Part II of the School Health Service and Handicapped Pupils Regulations, 1953 (revoked by the Special Schools and Establishments (Grant) Regulations, 1959 (S.I. 1959/366)), which prescribe the conditions for grant to local education authorities in respect of the medical inspection and treatment of pupils. The requirements imposed on the authorities by these regulations are no longer conditions of grant, but do not differ substantially from the existing

conditions, except that specific requirements as to the occasions on which medical and dental inspection are to be carried out have been omitted (S.I. 1959 No. 363).

The School Regulations, 1959, impose, in respect of schools (other than special schools) maintained by local education authorities, standards and general requirements to replace the provisions contained in the existing regulations for grant, *viz.*, Part II of the Schools Grant Regulations, 1951. A number of regulations have been simplified, particularly those relating to length of terms and hours of attendance (regulations 9 to 12) and there are the following further changes—

- (a) regulation 16 (2) and the First Schedule now specify the principal courses of training for teachers wishing to be qualified teachers;
- (b) regulation 20 specifies the requirements to be observed in respect of handicapped pupils receiving special educational treatment at ordinary schools (some of these were formerly in the School Health Service and Handicapped Pupils Regulations, 1953 (S.I. 1953/1156: 1953, I, p. 613));
- (c) regulation 19 of the existing regulations, relating to the employment as teachers of Ministers of Religion, has been omitted (S.I. 1959 No. 364).

The Handicapped Pupils and Special Schools Regulations, 1959, replace the existing regulations, contained in Parts III, V and VI of the School Health Service and Handicapped Pupils Regulations, 1953, which define the categories of pupils requiring special educational treatment, and prescribe the requirements to be observed in respect of special schools. No alteration of any substance has been made in the regulations (S.I. 1959 No. 365).

The Special Schools and Establishments (Grant) Regulations, 1959, revoke the existing regulations providing for grant in respect of all special schools and establishments for the further education and training of disabled persons, and replace them by provisions limited to grant in respect of schools and establishments of this kind maintained by bodies other than local education authorities. No change of substance has otherwise been made (S.I. 1959 No. 366).

The Further Education (Local Education Authorities) Regulations, 1959, replace the provisions of the Further Education Grant Regulations, 1946 (and amendments), applicable to local education authorities. Besides omitting regulations relating to grant, they effect a considerable simplification of the provisions of the existing regulations, and the Minister's requirements have been modified as follows:

- (a) approval will no longer be required for arrangements governing the admission of students, tests of progress and fees;
- (b) regulations relating to the recognition of particular establishments or courses are no longer appropriate, but the Minister's approval will be required for certain courses (regulation 10);
- (c) major establishments are required to have governing bodies (regulation 8); and
- (d) the provision of furniture and equipment will require the Minister's approval in certain cases (regulation 7) (S.I. 1959 No. 393).

The Further Education (Grant) Regulations, 1959, revoke the existing regulations relating to grant to institutions providing further education, and replace them by shorter and simpler provisions applicable to bodies other than local education authorities. (Provision is made in regard to the latter by the Further Education (Local Education Authorities) Regulations, 1959 (S.I. 1959/393).) The only change of any substantial importance is the omission of the regulation requiring the Minister's approval for arrangements governing the admission of students and tests of progress (S. I. 1959 No. 394).

The Training of Teachers (Local Education Authorities) Regulations, 1959, replace the provisions of the Training of Teachers Grant Regulations, 1955

(and amendments), applicable to training colleges, and art schools providing training for teachers, maintained by local education authorities. They reproduce the effect of those provisions other than those authorising grant, the only modifications of any substance being—

- (a) the regulations extend to all institutions providing for the training of teachers of technical subjects in establishments of further education; and
- (b) specific requirements in relation to premises and accommodation are now laid down (regulation 8) (S.I. 1959 No. 395).

The Training of Teachers (Grant) Regulations, 1959, revoke the existing Training of Teachers Grant Regulations and replace them by provisions applicable to training colleges, and other establishments providing training for teachers, not maintained by local education authorities. The Minister's requirements in relation to training colleges and other institutions maintained by local education authorities are contained in the Training of Teachers (Local Education Authorities) Regulations, 1959, and many of those requirements are applied by these regulations to the establishments covered by them.

These regulations contain only minor changes, the chief being that the Minister may name courses to be instituted, or discontinued as the case may be, at a training college or centre (regulation 9); and more specific provision is made in relation to accounts and returns (regulation 15) (S.I. 1959 No. 396).

The Schools Grant Amending Regulations No. 9, 1959: (a) revoke, in consequence of the passing of the Local Government Act, 1958, existing regulations relating to grant to local education authorities in respect of maintained and assisted schools; and (b) make consequential provision for the application to direct-grant schools (other than grammar schools) of the relevant provisions of the Schools Regulations, 1959, in place of the revoked regulations (S.I. 1959 No. 397).

The Provision of Milk and Meals Amending Regulations, 1959, re-enact with modifications the existing regulations prescribing the milk, meals and other refreshments to be supplied by local education authorities to day pupils in maintained schools. By reason of the modifications made the arrangements regarding the supply of additional milk, and of meals and refreshments other than mid-day dinners, will be left to the discretion of the authorities (S.I. 1959 No. 409).

The Milk and Meals Grant Regulations, 1959, revoke the Education (Local Education Authorities) Grant Regulations, 1952, and all amending regulations and replace them by provision for grant in respect of milk and school dinners only. No substantial alteration has been made in the method of assessing the expenditure on which grant is payable (S.I. 1959 No. 410).

The General Grants (Pooling Arrangements) Regulations, 1959, provide for the pooling of expenditure of all local education authorities on teacher training, advanced further education and the education of pupils who do not belong to the area of any authority, and for the adjustment of the general grants payable under section 1 of the Local Government Act, 1958, in order to distribute the expenditure amongst all local education authorities (S.I. 1959 No. 447).

The Local Education Authorities Recoupment (Primary, Secondary and Further Education) Amending Regulations, 1959, provide that the expenditure of local education authorities in educating pupils who do not belong to the area of any authority will be shared amongst all local education authorities by means of adjustments of the general grant payable under section 1 of the Local Government Act, 1958, from April 1, 1959, instead of by adjustment

of the main education grant, which will cease to be payable from that date (S.I. 1959 No. 448).

The Regulations for Grants to Local Museums and Art Galleries (Revocation) Regulations, 1959, revoke obsolete regulations made by the Board of Education under the Education Act, 1921, which authorised grants towards the acquisition by museums and art galleries of works of art and other objects, but excluded oil paintings (S.I. 1959 No. 449).

The Rate-deficiency Grants Regulations, 1959, provide for the submission of information, estimates and conclusive calculations, times of payment, etc., under sections 5-7 of the Local Government Act, 1958 (S.I. 1959 No. 525).

The British Transport Commission (Payments for Local Authorities) Regulations, 1959, provide for estimates, etc., taking into account the provisions of the Local Government Act, 1958 (S.I. 1959 No. 526).

Rating and valuation. The Rate-demand Rules, 1958, prescribe new forms of demand notes to be used by the councils of county boroughs, metropolitan boroughs and county districts. The new forms take account of the changes with respect to local government finance made by the Local Government Act, 1958 (S.I. 1958 No. 2198).

The Ministry of Housing and Local Government has issued Circular No. 65/58 dated December 31, 1958, which states that the principal change made by the Rate-demand Rules, 1958, is the requirement to show on the face of the demand note the rate in the pound levied for the purposes of the rating authority and of each authority which precepts on it.

The Rate-product Rules, 1959, provide, in relation to county districts, county boroughs in the Metropolitan Police District, and London rating areas, for the determination of the product of a rate of a penny in the pound and of the amount due under precepts of county councils and the Receiver for the Metropolitan Police District, for 1959-60 and subsequent years (S.I. 1959 No. 258).

The Precepts Rules, 1959, prescribe new forms of precepts for use by county councils and the Receiver for the Metropolitan Police District. The new forms take account of the changes with respect to local government finance made by the Local Government Act, 1958 (S.I. 1959 No. 260).

The Ministry of Housing and Local Government has issued Circular No. 15/59 dated February 20, 1959, which says that the statements in the forms of precepts prescribed by these Rules have been designed to provide rating authorities with the information they require for the preparation of the statements forming part of rate demand notes.

The Joint Under-Secretary of State for Scotland stated on January 27, 1959, that the question of rating valuations on electricity undertakings in Scotland would be reviewed after the revaluation in 1961 (598 H.C. Deb. 862-863, January 27, 1959; see also 213 H.L. Deb. 609-610, January 20, 1959).

On February 23, 1959, the Rating and Valuation Bill received a second reading. This postpones the revaluation of dwelling-houses from 1961 to 1963 (600 H.C. Deb. 816-876).

The following decisions have been reported on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955: *General Nursing Council for England and Wales v. St. Marylebone B. C.* [1959] 2 W.L.R. 308; *Guinness Trust (London Fund) Founded 1890 Registered 1902 v. West Ham B. C.* [1959] 1 W.L.R. 233; *Butcher v. Cambridge Corporation* (1958) 56 L.G.R. 393; *English Speaking Union v. Westminster City Council* (1959) 52 R. & I.T. 124; *Briton Ferry Steel Co. v. Neath Corporation* (1957) 2 R.R.C. 270.

On interpretation of "building or structure" (petrol storage tank) under Rating and Valuation Act, 1925, s. 24, see *Shell-Mex and B. P. v. Holyoak* [1959] 1 W.L.R. 188, H.L. reversing decision of C.A.

A valuation court decided in 1951 that a society was exempt from rating under the Scientific Societies Act, 1843. By an Act of 1952 a new valuation list came into force on April 1, 1956, and the society's hereditament was entered on the new list with rateable value figures. The society claimed that it still qualified for exemption under the Act of 1843, and made a proposal for the alteration of the list. On the matter coming before the valuation court, the court decided that the question of the exemption had already been decided and accordingly refused to hear the valuation officer's objection unless he could bring evidence (which in fact he did not desire to do) to show some variation in the society's constitution or activities since 1951. On the valuation officer's appeal to the Lands Tribunal the society pleaded *res judicata*, but the tribunal rejected this plea. The society appealed. *Held* (Sellers L.J. dissenting), affirming the decision of the Lands Tribunal, that the matter was not *res judicata*. The effect of any decision relating to the list that existed in 1951 became exhausted when that list was replaced by a new valuation list: *SOCIETY OF MEDICAL OFFICERS OF HEALTH v. HOPE* [1959] 2 W.L.R. 377; [1959] 1 All E.R. 509, C.A. (applying dictum in *Leith Harbour and Docks Commissioners v. Inspector of the Poor* (1866) L.R. 1 Sc. & Div. 17, 22).

Greater London

Royal Commission. The written memoranda of evidence from Government Departments have been published (H.M.S.O. 73-34).

Housing

Circular. The Ministry of Housing and Local Government has issued a circular of a report by the Housing Management Sub-Committee of the Central Housing Advisory Committee on the management of local authority housing estates (Circular No. 24/59).

Protection of tenants. On February 25, 1959, the House of Commons gave leave to bring in a Bill to provide security of tenure for tenants of local authorities (600 H.C. Deb. 1127-1130).

Local Legislation

Town meetings and polls. On March 20, 1959, the House of Commons debated a motion (which was withdrawn) to abolish the statutory obligation in section 255 and Schedule 9 of the Local Government Act, 1933 (602 H.C. Deb. 771-837).

Members

The Local Government (Allowances to Members) (Prescribed Bodies) Regulations, 1959, are primarily consolidatory. The consolidated Regulations are those which (a) include certain bodies among the bodies the members of which are entitled, under the Local Government Act, 1948, to financial loss, travelling and subsistence allowances in respect of the performance of their duties (reg. 2); and (b) entitle the members of local authorities, etc., to similar allowances when serving on certain other bodies to which they have been appointed or nominated (reg. 3). In addition two new bodies, the South Staffordshire Stipendiary Justice Commissioners and the Staffordshire Potteries Stipendiary Justice Commissioners, are included in regulation 2 (S.I. 1959 No. 1).

Powers

A builder can recover payment for works which his employer intends to use in a way contrary to a by-law if the works do not in themselves infringe it and the local authority suspends its enforcement so that the employer has the enjoyment of the works.

A by-law required builders to comply with a requirement that a water-closet should not be entered from any room used for human habitation but provided that a water-closet used exclusively with a bedroom or dressing-room might be entered directly from such room. A builder was engaged to construct a water-closet between, and opening off, two rooms. They were shown on the plans as a bedroom and dressing-room in the same occupation, though this was not their contemplated use, which was as two bedrooms. After the works were complete the local authority discovered the breach of the by-law but agreed not to enforce it during the life of the employer's wife, who lived for two years, on the employer undertaking to secure compliance with the by-law on her death. In an action by the builder for his remuneration the employer contended that as the contract was illegal he was not bound to pay. *Held*, that the builder should succeed; the by-law was not unreasonable, though difficult to construe in its application to a bedroom and dressing-room in the same occupation. On its true construction it forbade a water-closet opening off two rooms to be used as bedrooms. Nonetheless, as the works specified by the contract were not (in the absence of use as two bedrooms) of themselves a breach of the by-law and as the local authority had allowed the works to remain so that the employer had two years' enjoyment of them, there was no such illegality as to disable the builder from recovering.

Per Sellers L.J.: "The only justification for the course taken by the local authority was that there were, perhaps, special circumstances relating to the particular property": *TOWNSEND (BUILDERS) v. CINEMA NEWS & PROPERTY MANAGEMENT* [1959] 1 W.L.R. 119; *sub nom.* *TOWNSENDS (BUILDERS) v. CINEMA NEWS & PROPERTY MANAGEMENT* (*DAVID A. WILKIE & PARTNERS THIRD PARTY*) [1959] 1 All E.R. 7, C.A.

The local planning authority is not as such a "person aggrieved" who can appeal under section 23 (5) of the Town and Country Planning Act, 1947, against a decision of a court of summary jurisdiction quashing an enforcement notice under section 23 (4).

Justices quashed under section 23 (4) of the Act an enforcement notice served by the local planning authority requiring the discontinuance of the use of land as a car park. The authority gave notice to appeal and argued that it was a "person aggrieved" by the decision within section 23 (5). *Held*, that the local planning authority was not a person aggrieved within the meaning of the Act; "aggrieved" implies something more than annoyance or frustration in a public duty, and here there was no question of the decision throwing costs or any other financial burden onto the authority.

Quaere whether the authority is "any person" within section 23 (5) even if it is aggrieved: *EALING CORPORATION v. JONES* [1959] 2 W.L.R. 194; [1959] 1 All E.R. 286, D.C.

Reorganisation

Local Government Commissions. The Minister of Housing and Local Government stated that the annual salaries of members were, for England: part-time chairman £1,800, vice-chairman £6,000, members £4,750, part-time members £1,000; for Wales: part-time chairman £3,500, part-time vice-chairman £2,000, part-time members £1,500 and £1,000 (598 H.C. Deb. 128, January 28, 1959).

Universities

Scotland. The report of the special committee (Chairman: Lord Sorn) on local contributions to the Scottish Universities has been published (Cmnd. 640). The Secretary of State has accepted its recommendations (602 H.C. Deb. 98-99, March 24, 1959).

Welfare

Homeless families. The Ministries of Housing and Local Government and of Health have issued a joint circular on homeless families (Circular No. 17/59 (M.H.L.G.), No. 4/59 (M.H.)).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 170); HIGHWAYS (above, p. 171).

MONOPOLIES AND RESTRICTIVE PRACTICES

Monopolies Commission

Report. The annual report by the Board of Trade for 1958 has been published. The Commission have the following references before them: the supply of certain chemical fertilisers; the supply of cigarettes and manufactured cigarette and pipe tobacco; the supply of machinery for the manufacture or packaging of cigarettes or of cigarette or pipe tobacco; the supply of electrical equipment for mechanically propelled land vehicles. Suggestions have been received during 1958 that the following subjects should be referred to the Commission: aluminium ingots, carbon rods for primary batteries, the distribution of petrol and lubricating oil for motor-vehicles, electric shavers, gramophone records, the milling industry, mimosa extract for tanning, shot-gun cartridges, sodium bichromate (H.C. 96 of 1958-59).

Restrictive Practices Court

Agreements registered. The Registrar of Restrictive Trading Agreements stated on January 12, 1959, that 2,100 agreements had been registered by the end of 1958. During 1957 and 1958, the parties to over 140 of them were advised that it was intended to refer their agreements to the court. In 55 of these cases, the registrar had been informed that the agreements had been either abandoned altogether or so altered as to remove all registrable restrictions from them. He had also been informed that similar steps had been taken in respect of some 40 further agreements.

The cases already heard by the Restrictive Practices Court are those of the agreements of the Chemists' Federation, the Yarn Spinners' Association and the British Constructional Steelwork Association (see below). Further cases already fixed for hearings are as follows:

Blanket Manufacturers' Association; Radio Valve Manufacturers' Association; three manufacturers of semi-rotary wing pumps; Water-tube Boiler-makers' Association; Incorporated National Association of British and Irish Millers, South-eastern Group of Flour Millers, North-eastern Group of Flour Millers, Scottish Flour Millers' Association; and Associated Manufacturers of Domestic Electric Cookers.

In references made to the Restrictive Practices Court under section 1 (2) of the Restrictive Trade Practices Act the court cannot hold that as a general rule price stability induced by an agreement is a benefit to the purchasing public, for that would be going contrary to the general principle embodied in the Act that price restrictions are contrary to the public interest.

The Registrar of Restrictive Trading Agreements referred to the court an agreement between the members of the Yarn Spinners' Association, binding them not to sell cotton yarn at prices lower than those fixed under the agreement. The Association contended that the restrictions were not contrary to the public interest, because they conferred on "the public" substantial benefits within the meaning of section 21 (1) (b) of the Act, the removal of the restrictions would "have a serious and persistent adverse effect on the general level of unemployment in an area" within section 21 (1) (e), and on other grounds within section 21 (1) (g). By the time yarn had reached the public in the form of cotton piece-goods an increase or decrease in the price of yarn to the immediate purchaser from the spinners would have a very

diminished impact on shop prices. The minimum price fixed was an artificial figure calculated on a hypothetical average cost. In theory it was designed to tide the spinner over short periods of recession and to guard against cut-throat competition such as occurred in the industry in and after the great slump of 1929-31. But it was not a mere "stop-loss" scheme and the minimum prices had been charged as the rule rather than the exception since 1952. The court found that: (i) the industry could and should be made smaller and more compact and that the restrictions retarded this process by protecting high-cost spinning mills which would otherwise fail; (ii) abandonment of the restrictions would not leave the industry without enough capacity for all ordinary demands; (iii) the restrictions prevented "price invasion," that is, the luring away of other spinners' customers by offering lower prices; (iv) competition of quality remained, but if it was strengthened by the restrictions then only to a negligible extent; (v) the restrictions promoted price stability; (vi) they benefited the weavers (who bought yarn or doubled yarn and made it into unfinished cloth for sale to other processors); (vii) the closing of high-cost spinning mills on the abrogation of the restrictions would have a serious and persistent adverse effect on unemployment in Lancashire; (viii) a lowering of the price of yarn could in the end lead to an appreciable benefit to the public by reducing the price of goods bought by them; (ix) such a reduction would encourage exports; and (x) there was under the scheme a waste of national resources caused by the idle excess capacity of the industry preserved by it. *Held*, that on balance it would be unreasonable to continue the restrictions in the scheme, which was therefore contrary to the public interest within section 21 of the Act. Price invasion is not a bad thing. It is only one form of normal trade competition. The removal of the restrictions would not prevent competition in quality but merely reintroduce competition in price. Though there might be cases where price stabilisation conferred a peculiar benefit sufficiently great to outweigh the loss of a free market, this was not one of them.

Quære whether a benefit to the weavers was a benefit to the public within section 21 (1) (b): *Re YARN SPINNERS' AGREEMENT* [1959] 1 W.L.R. 154; [1959] 1 All E.R. 299; 1 R.P. 118, R.P.Ct.

The Registrar referred to the court an agreement between the members of the British Constructional Steelwork Association, which at the date of the notice of reference had provided for a price-fixing scheme. The court, on the association's admitting that the agreement contained registrable restrictions, directed that a draft order should be submitted to the clerk of the court. The order should recite that the association admitted the restrictions and that no evidence had been offered by them, and should declare that the restrictions were contrary to the public interest: *Re BRITISH CONSTRUCTIONAL STEELWORK ASSOCIATION'S AGREEMENT* [1959] 1 W.L.R. 306; 1 All E.R. 428; 1 R.P. 199, R.P.Ct.

NATIONAL HEALTH SERVICE

Accounts

Accounts of Regional Hospital Boards, Boards of Governors, Hospital Management Committees, Executive Councils and the Dental Estimates Board, for England and Wales, for 1957-58 have been published, together with the Report of the Comptroller and Auditor General thereon (H.C. 105 of 1958-59).

Similar accounts for the Scottish authorities have also been published (H.C. 106 of 1958-59).

Consultant

Dismissal. On March 4, 1959, the House of Lords debated a Question which asked the Government to introduce regulations or legislation to ensure that where a court had held that a consultant or senior medical officer had been wrongfully dismissed by a Regional Hospital Board or Board of

Governors, he should be immediately reinstated in his original post (214 H.L. Deb. 750-754).

Debates

On March 12, 1959, in Committee of Supply, the House of Commons debated the National Health Service (601 H.C. Deb. 1462-1567).

On January 26, 1959, the House of Commons, on the adjournment, debated the midwifery services (598 H.C. Deb. 843-854).

Executive Councils

Consultation. The Ministry of Housing and Local Government have issued a circular reminding housing authorities of the desirability of early consultation with Executive Councils when their actions may affect doctors' practices (Circular No. 16/59).

Regional Hospital Boards

An order has been made providing for consequential matters resulting from the setting up of the Wessex Regional Hospital Board (S.I. 1959 No. 497; see above, p. 69).

Remuneration

Royal Commission. Minutes of Evidence of the 21st Day (Joint Consultants' Committee) and 22nd Day (Scottish Medical Practices Committee and Scottish Association of Executive Councils) have been published (H.M.S.O. 73-33-21, 22).

NATIONAL INSURANCE

Bill

On January 27, 1959, the National Insurance Bill [57] received its second reading (598 H.C. Deb. 887-1020). The report by the Government Actuary on the financial provisions of the Bill have been published (Cmnd. 629).

Debate

On February 10, 1959, in Committee of Supply, the House of Commons debated National Insurance and Family Allowances (599 H.C. Deb. 1002-1129).

Decisions of the Commissioner and the Tribunal

Absence from Great Britain. A ship's greaser was taken ill at sea, on a ship bound for the West Indies. In New York he was taken off articles and put aboard another British ship to be brought back to Great Britain as a distressed British seaman. *Held*, that he was "left outside Great Britain." His position was no different from that of a member of the crew who might have been left in hospital on shore: Decision No. R(S) 10/58.

Availability for employment. A cotton mill worker with the subsidiary occupation of fish and chip shop proprietor was temporarily suspended from his work at the mill. He had been allowed on Tuesdays and Fridays, the days when the fish and chip business was open at mid-day, to leave his work at 11 a.m. instead of 12 noon, *i.e.*, he was allowed an hour off on two days a week. The claimant stated that he would not open the shop at mid-day on Tuesdays and Fridays if an employer refused to allow him an hour off on those days. *Held*, that the fact that a person when otherwise unemployed does some work at a subsidiary occupation during normal working hours does not prevent him from being available for full-time employment if it is plain that he will at once abandon his subsidiary occupation at any time at which it conflicts with normal full-time work: Decision No. R(U) 24/58.

A claimant, registered for employment as a general farm worker, cultivated a smallholding. *Held*, that, although on the smallholding the claimant was his own master whilst as a general farm worker he might seldom have to take decisions as to the work to be done, nevertheless work on the smallholding was substantially the same as that of a general farm worker and was therefore not different in nature from the full-time employment for which the claimant was available. Decisions R(U) 16/56 and R(U) 12/57 distinguished: Decision No. R(U) 26/58.

A married woman with two young children was not prepared to work outside an area of about six miles radius. She was prepared to work in a shop or with the I.C.I. (who were substantial employers of labour in the area) and had done temporary work for the post office. *Held*, that the claimant was not without reasonable prospects of securing employment, nor was the absence of such prospects due to the restrictions she imposed; therefore Regulation 6 (1) (aa) did not apply: Decision No. R(U) 31/58.

An unmarried labourer aged twenty-two, living in Shetland, had been unemployed for seven months and had no prospects of local employment. He refused employment as an unskilled worker at a place about 750 miles distant from his home. *Held*, that the claimant had failed to show good cause for refusing a situation which could not be regarded as unsuitable. The pay was not lower than the claimant had been receiving and was at the rate generally observed in the district; the fact that no subsistence allowance was offered was not a tenable objection in view of the wages offered and the hostel accommodation available; and there were arrangements for the advance of travelling expenses in certain cases about which the claimant would have learnt if he had inquired of the employment exchange: Decision No. R(U) 34/58.

Day of unemployment. Employers had closed on Boxing Day for several years in addition to particular holidays which were specified in a written agreement. *Held*, that Boxing Day had become a recognised holiday, notwithstanding that it was a day other than those specified as holidays in the written agreement on conditions of employment. It was not a day of unemployment: Decision No. R(U) 27/58.

When his employment ended a claimant received payment for holidays he had not taken in the current and earlier leave years. *Held*, that in determining to which days such holiday payments should be attributed the principles of Decision R(U) 42/52 should be followed. The question whether a claimant is entitled to receive payment for accumulated holidays before his employment terminates is immaterial and the views expressed thereon in Umpire's Decision 754/28 are not compatible with the principles laid down in Decision R(U) 42/52: Decision No. R(U) 32/58.

Home confinement grant. Claimant, who had made arrangements to be confined at home, had been admitted to hospital in expectation of an early confinement, but she was discharged home two weeks later to await delivery. Twelve days later she was readmitted to hospital as an emergency case and was confined the same day. Although a hospital bed had been booked for her confinement when the claimant was first sent home, she and her husband were ignorant of the arrangement. *Held*, that home confinement grant was payable. "Arrangement" in Regulation 5 (i) (ii) of the Maternity Benefit and Miscellaneous Provisions Regulations must be an arrangement of which the claimant is at least aware: Decision No. R(G) 4/58.

Late claim. Widow had emigrated to America before the provisions relating to retirement pensions had come into operation. She was sixty-five on December 24, 1955, but did not know she was entitled to claim a pension until she read an article in an American weekly paper. She claimed pension on April 11, 1957. *Held*, that she had proved good cause for failing to claim earlier. It was not reasonable to expect a person who was wholly out of touch with legislation in England, and whose qualification for a retirement

pension would depend on repealed Acts, to realise that there were rights to inquire about: Decision No. R(P) 5/58.

An orthodox Jewish rabbi retrospectively claimed unemployment benefit for the first and second days of the Jewish Passover on which the law of his faith forbade him from engaging in any occupation other than the oral teaching of religious subjects. It was conceded that it is the practice in the orthodox Jewish faith to employ persons in such oral teaching on the afternoons of those days. The claimant was registered for employment as a tutor. *Held*, that, because of the limitations imposed upon him by his faith, the claimant had good cause for failure to claim on the days in question, and, as it could not be said that he had no reasonable prospects of employment, he could be held to have been available for employment on those days: Decision No. R(U) 33/58.

Misconduct. A claimant, who had been told on engagement that he would be required to work a reasonable amount of overtime, refused to do so when asked although he had ample warning and offered no reasonable excuse for his refusal. He was consequently discharged. *Held*, that the claimant was legally obliged to work overtime and his neglect to comply with his employers' reasonable order amounted to misconduct through which he lost his employment: Decision No. R(U) 35/58.

"Normal course." A docker at a port where for several years there had been a shortage of work claimed unemployment benefit for a Monday on which he had not worked. In the year before his claim he had worked for four days or less during thirty-three weeks. His record for the two preceding years was similar. *Held*, that the claimant, although against his wish, had become a person who did not work on every day in a week. The conditions causing his pattern of employment were not exceptional as they had prevailed for several years. The Monday was not therefore a day of unemployment because, having worked on four days in that week, the claimant had been employed to the full extent normal in his case: Decision No. R(U) 28/58.

A guarantee agreement provided that, when a recognised holiday occurred, the period of guarantee should be reduced "proportionately." *Held*, that this meant that the normal period of guarantee should be reduced, not simply by the number of days of holiday, but by the ratio which the number of days of holiday bore to the claimant's normal working week: Decision No. R(U) 1/59.

Overlapping benefits. Widow was awarded a reduced retirement pension based on her own deficient contribution record. She claimed that by adding her husband's contributions to her own, she could receive a pension at the full rate. The Minister decided that on that basis the contribution conditions were fully satisfied. She was, however, in receipt of a dependant's war pension which exceeded the retirement pension to which she would have been entitled if her late husband's contributions were taken into account. *Held*, that she would derive no benefit from relying on her late husband's insurance because of the provisions of the Overlapping Benefits Regulations but she was entitled to Retirement Pension on her own insurance which was excepted from those provisions: Decision No. R(P) 4/58.

A married man sent for his mother to keep house for him and to look after his three children when his wife left him. His mother was in receipt of a personal retirement pension of 50s. per week. She had no home of her own and she was expected to live with her son indefinitely. When he fell sick he claimed an increase of benefit in respect of her. *Held*, that the conditions that she was residing with the claimant and had the care of the children were satisfied but the dependency benefit had to be adjusted under the Overlapping Benefit Regulations to take account of her Retirement Pension: Decision No. R(S) 9/58.

Residence in Great Britain. In 1947, an existing old age pensioner, because of difficulty of living within his means, left Great Britain to live in Southern Rhodesia. His prospects under two wills encouraged him to believe that he could live within his means in Great Britain, to which he returned in April, 1956, but when his expectations were not fully realised he went back to live in Southern Rhodesia in March, 1957. *Held*, that he was resident in Great Britain from April, 1956, to March, 1957, Great Britain being his settled abode although he had not a settled abode in Great Britain. He had therefore qualified for a retirement pension under the National Insurance Acts at the rate as increased by the Act of 1954. (R(P) 4/54 distinguished); Decision No. R(P) 6/58.

Separated wife. The claimant, who was separated from his wife, had a court order to pay his wife 23s. per week. During the period of about forty weeks before the date of his claim he had paid an average weekly sum of 26s. of which 3s. was in respect of arrears. *Held*, that the claimant had not been contributing at a weekly rate of more than 23s.; that to hold otherwise would be to give undue benefit to a husband who accumulated arrears and then paid them off over a long period, as compared with the husband who paid fully and punctually: Decision No. R(U) 25/58.

Share-fishermen. A share-fisherman was temporarily "stood down" for a fortnight when the vessel on which he was employed changed to seine net fishing, requiring a smaller crew. He had no share in the ownership of the vessel. *Held*, that the claimant, as distinct from a share-fisherman who was owner or part owner of a vessel, had ceased to be a member of the crew whilst "stood down" and was not therefore required to satisfy the conditions of regulation 14B (2) of the Mariners Regulations: Decision No. R(U) 29/58.

A share-fisherman claimed unemployment benefit when bad weather prevented his vessel from leaving harbour at the normal early morning time. Conditions improved sufficiently to permit vessels to sail about 11 a.m. and return on the tide at 2.30 p.m. but no vessels left harbour. *Held*, that, in these circumstances, the fishing vessel could not reasonably have put to sea with a view to fishing. Regulation 14B (2) (a) of the Mariners Regulations should be construed as relating to all normal and reasonable times for putting to sea on the day and at the locality in question: Decision No. R(U) 30/58.

Sickness benefit. A recipient of sickness benefit claimed an increase for his wife when she was absent from work owing to her own sickness, and receiving "sick pay" from her employer. It was contended that the "sick pay" was not "earnings." *Held*, that the sick pay was derived from her occupation and was therefore earnings and these were sufficient to prevent payment of an increase of benefit to her husband: Decision No. R(S) 8/58.

Trade dispute. Because of the effect on the work of a dispute between joiners and scaffolders an employer discharged employees of the firm including the claimant, a joiner. The claimant referred to the Industrial Disputes Order, 1951, and contended that only an "issue" and not a "dispute" existed. *Held*, that the claimant lost employment by reason of a stoppage of work due to a trade dispute which concerned his conditions of employment and in which he was directly interested. What constitutes a trade dispute for the purposes of section 13 of the National Insurance Act, 1946, must be decided by reference to the definition contained in that section: Decision No. R(U) 36/58.

Earnings

On March 18, 1959, the House of Commons approved the National Insurance (Earnings) Regulations, 1959, a draft of which had been laid before the House on March 4, 1959 (602 H.C. Deb. 545-586).

European Interim Agreement

The Family Allowances, National Insurance and Industrial Injuries (European Interim Agreement) Order, 1959, gives effect in England, Wales and Scotland to certain provisions of the European Interim Agreement on social security other than schemes for old age, invalidity and survivors and to a Protocol supplementing the Agreement made between member Governments of the Council of Europe at Paris on December 11, 1953, in so far as that Agreement and Protocol provide for reciprocity with the governments of other countries which have ratified the Agreement and Protocol in relation to the Family Allowances Acts, 1945 to 1956, the National Insurance Acts, 1945 to 1957, and the National Insurance (Industrial Injuries) Acts, 1946 to 1957, and modifies those Acts in their application to cases affected by any such provisions of the Agreement and Protocol (S.I. 1959 No. 292).

The National Insurance (European Interim Agreement) Order, 1959, gives effect in England, Wales and Scotland to the European Interim Agreement on social security schemes relating to old age, invalidity and survivors, and to a Protocol supplementing that Agreement, made between member Governments of the Council of Europe at Paris on December 11, 1953, in so far as the provisions of that Agreement and Protocol provide for reciprocity with the Governments which have ratified the Agreement or Protocol in relation to the National Insurance Acts, 1946 to 1957, and modifies that Act in its application to cases affected by any such provisions of the Agreement and Protocol (S.I. 1959 No. 293).

NATIONAL INSURANCE (INDUSTRIAL INJURIES)

Decisions of the Commissioner and the Tribunal

Accident. A coal miner suffered an industrial accident when he fell and strained himself at work. He completed the shift though complaining of pain in the chest. He went to work the next day, still in pain, but did not work thereafter. Two days later, he collapsed with severe pain, and on the following morning had a further collapse, resulting in death within a few minutes. A post-mortem examination established that the cause of death was a dissecting aortic aneurysm. *Held* that, on the medical evidence, death did not result from the relevant injury. In a case of dissecting aneurysm of the aorta there are normally two episodes each accompanied by very severe pain. It was most unlikely that the deceased could have finished his shift if the first episode had occurred during the incident at work. The first collapse, two days after he finished work, probably represented the onset of the condition which caused death: Decision No. R(I) 28/58.

Dependency. A widow claimed industrial death benefit in respect of her son who died as a result of an industrial accident. *Held*, that the "family fund method" must be applied when determining whether one person is maintaining another to a substantial extent: Decision No. R(I) 2/59.

New intervening cause. On June 26, 1956, an underground miner slipped while stepping over a chain conveyor at work, and fell catching his back on the edge of the conveyor. He returned to work just over a month later though still receiving treatment for his back injury. On October 15, 1956, before that course of treatment ended, he slipped in the yard of the house where he was lodging and injured his left buttock. This caused a further period of incapacity from October 15, 1956 to December 14, 1956. *Held*, that claimant had not proved that his incapacity from October 15, 1956 to December 14, 1956, was the result of the industrial accident suffered on June 26, 1956. He had recovered sufficiently from that accident to return to work, and his total incapacity after the non-industrial accident could not be attributed to the previous industrial accident. (R(I) 3/56 followed): Decision No. R(I) 27/58.

"*Out of and in the course of employment.*" The death of a miner was due to cerebral tumour. Some years previously he had suffered slight injuries to his head when dirt had fallen on him on two occasions. It was also claimed that he had hit his head on the roof on other occasions causing trivial injuries. A post-mortem examination revealed no evidence of past damage to the skull, the brain covering or to the brain itself as a result of trauma. The tumour on a glioma was malignant and fast growing within the brain substances and may not have existed when the deceased had suffered his head injuries. *Held*, that death was not the result of injury by accident arising out of and in the course of his employment. Connection between trauma and intrinsic cerebral tumour discussed: Decision No. R(I) 25/58.

Claimant was in bed during an off-watch period when he was attacked by the only other keeper on duty in the lighthouse. He received injuries to his head and left arm. *Held*, that the injuries were caused by accident arising out of his employment. He was compelled by the nature of his employment to live alone for long periods with a man whose mental instability was aggravated by the lonely conditions and he was therefore liable to the risk of assault arising from the circumstances of his employment. Decision R(I) 76/54 distinguished: Decision No. R(I) 30/58.

A locomotive engine driver was knocked down by a light engine on the yard railway lines outside the engine shed on his way to sign on for duty. The shed and yard together constituted the claimant's base of operations. Within the shed yard limits there was no specifically prescribed route to or from the shed. The route taken by the claimant was regularly used by employees to the knowledge of the employer who never objected. *Held*, that the accident arose out and in the course of his employment; the engine shed and yard were one "locus" and the claimant had therefore entered upon his sphere of employment. Decisions R(I) 27/53, R(I) 30/53 and R(I) 28/55 distinguished: Decision No. R(I) 32/58.

A male nurse while cycling to work was injured when his bicycle skidded on a frosty road surface in the hospital grounds. The accident happened at 6.15 p.m. He habitually arrived at this time to enjoy a game of billiards and have some refreshment before his work at 7.10 p.m. His contract of service did not require him to arrive early. *Held*, that the accident did not arise out of and in the course of the claimant's employment. Though the accident occurred on his employer's premises his early arrival was incidental to his desire to enjoy himself before work began and not incidental to his employment. Principles enunciated in Willis, *Workmen's Compensation*, cited with approval by the Commissioner: Decision No. R(I) 1/59.

A miner was injured whilst travelling to work by a 'bus run by a public transport undertaking. The 'bus was operated under a road service licence but was run specially for the miners although the public could travel on a certain section of the return journey. *Held*, that the accident was an industrial accident by virtue of section 9 of the Act. Section 9 (1) (b) (i) and (ii) discussed, and Decisions R(I) 67/51 and R(I) 15/57 compared: Decision No. R(I) 3/59.

Prescribed disease. Since 1936 claimant worked for substantial periods in the ring room of a cotton mill which was separated from the card room by a partition to within nine inches of the ceiling. There were broken windows in the partition, and swing doors were frequently left open. *Held*, that byssinosis was prescribed in relation to the claimant. As the ring room was so imperfectly separated from the card room it should not be regarded as a separate room and the claimant could be treated as working in the card room. "Room" discussed: Decision No. R(I) 26/58.

Regular occupation. In 1949, a student nurse who had completed two years' training and obtained a tuberculosis certificate, which permitted her to work as a staff nurse in certain sanatoria only, left her employment and was

soon afterwards incapacitated through tuberculosis. She had intended to continue her studies to become a State registered nurse. There was no evidence that she had abandoned nursing permanently and she returned to that occupation in 1957, when she recommenced work as a part-time staff nurse in a sanatorium working forty hours a week and performing all the duties of a staff nurse. *Held*, that it was the occupation for which she was studying that was her regular occupation, unless there was any evidence that she did not intend to complete her studies and pursue that occupation. Therefore, although a student nurse in 1949, her regular occupation at the date of development of the prescribed disease (March 1, 1951) was full-time nurse with a tuberculosis certificate: Decision No. R(I) 31/58.

A married woman, chiefly engaged in her household duties, had been employed regularly as a part-time shop assistant on one evening a week and as a totalisator operator for a different employer on another evening. She had followed the former employment for two years, and the latter for fifteen years. Her earnings from each of the two employments were approximately the same. *Held*, that the claimant had a regular occupation consisting of two equal part-time employments. The work was not casual, and neither employment was subsidiary to the other: Decision No. R(I) 33/58.

Review. Claimant's disablement resulting from a prescribed disease was assessed at 2 per cent. for life from September 14, 1955, and a gratuity was awarded and paid. Later, a medical board decided that he had suffered unforeseen aggravation and reassessed disablement at 20 per cent. from April 30, 1957, to April 30, 1958, followed by 2 per cent. for life. *Held*, that on review the insurance officer should have awarded (a) a gratuity at 2 per cent. from September 14, 1955, to April 29, 1957; (b) a pension at 20 per cent. from May 1, 1957 to May 6, 1958; and (c) a gratuity at 2 per cent. for life from May 7, 1958, and directed that (a), (b) in part and (c) in part should be treated as already paid by reason of the sum originally awarded and paid: Decision No. R(I) 34/58.

Special hardship allowance. A medical board made a final assessment of 3 per cent. to March 6, 1956; the assessment was upheld by the medical appeal tribunal. On October 29, 1956, the claimant applied for review on the ground of unforeseen aggravation, and a medical board made a provisional assessment of 5 per cent. from July 29, 1956, to April 28, 1957. *Held*, that there is no authority which would enable a medical board to decide, contrary to the medical appeal tribunal, that there was a loss of faculty from March 7, 1956, to July 28, 1956; time limits of review under section 40 (2) of the National Insurance Act, 1946, discussed. An increase of disablement benefit was not payable as it could not be accepted that the claimant was incapable of following his regular occupation during a period in which he had no loss of faculty (Decision R(I) 25/27 compared): Decision No. R(I) 29/58.

A colliery tram repairer injured his back on March 13, 1956. He remained at his regular occupation from that date until June 10, 1957, but did not do heavy lifting and ceased working daily overtime. Despite treatment from his doctor, the condition did not improve and the claimant was referred to a specialist in September, 1956. The specialist prescribed treatment and advised the claimant that he could continue at his work provided he took care and avoided heavy lifting. His condition still did not improve and eventually he had to give up work on June 10, 1957. Disablement benefit medical boards found a loss of faculty of a varying degree at all times since the end of the injury benefit period. *Held*, that the "continuous" condition was satisfied and special hardship allowance payable from June 12, 1957. The period worked in the regular occupation could be disregarded under Regulation 4A of the Industrial Injuries Benefit Regulations: Decision No. R(I) 35/58.

European Interim Agreement

See above, p. 185.

NATIONALISED INDUSTRIES

General

Co-operation. The report has been issued of the committee (chairman: Sir Cecil Weir) on co-operation between Area and Scottish Electricity and Gas Boards (Cmnd. 695; see also 602 H.C. Deb. 112, March 24, 1959).

Questions to Ministers. On February 3, 1959, the Speaker ruled that questions about the distribution of coal in constituencies could no longer be accepted by the Table since this was a matter for the National Coal Board, now that coal rationing had ceased. Answering a question, the Speaker said that the Minister of Power could answer an Adjournment debate on this subject, as he had a statutory right to get such information from the Board (599 H.C. Deb. 205-207).

Rules of debate. On February 17, 1959, the British Transport Commission Bill received a second reading. The Speaker indicated what matters could and could not be raised during the debate (600 H.C. Deb. 273-330).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 170).

Airways

Guarantees. The Treasury has issued statements of guarantees on loans proposed to be raised by the British European Airways Corporation (H.C. 46 of 1958-59) and the British Overseas Airways Corporation (H.C. 47 of 1958-59).

Coal

See above under **General**.

Electricity

Borrowing powers. The Electricity (Borrowing Powers) Act, 1959 (7 & 8 Eliz. 2, c. 20) received the Royal Assent on March 25, 1959. It amends section 15 (5) of the Electricity Act, 1957, by substituting for "£1,400m." the words "£1,800m. or such greater sum, not exceeding £2,300m., as the Minister may by order specify." It amends section 47 (7) of the Electricity Act, 1947, (relating to Scottish Boards) by substituting in similar terms £240m. to £300m. for £200m. and £110m. to £135m. for £75m. The Ministerial orders are subject to Commons approval.

Guarantees. The Treasury has issued statements of guarantees on loans proposed to be raised by the Electricity Council (H.C. 50 of 1958-59), the North of Scotland Hydro-Electric Board (H.C. 52 and 90 of 1958-59), and the South of Scotland Electricity Board (H.C. 53 of 1958-59).

Reports and Accounts for 1958 of the North of Scotland Hydro-Electric Board and Consultative Council (H.C. 86 of 1958-59) and of the South of Scotland Electricity Board and Consultative Council (H.C. 98 of 1958-59) have been published.

See also above under **General**.

Gas

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the Gas Council (H.C. 51 of 1958-59).

See also above under **General**.

Transport

Borrowing powers. The Transport (Borrowing Powers) Act, 1959 (7 & 8 Eliz. 2, c. 16) received the Royal Assent on March 25, 1959. It amends section 26 (1) (b) of the Transport Act, 1953, by substituting £1,200m. for £600m. It amends section 1, (4) of the Transport (Railway Finances) Act, 1957, by substituting £400m. for £250m.

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the British Transport Commission (H.C. 54 of 1958-59).

Inland waterways. The United Kingdom Government has outlined its views on the recommendations made in the report of the Committee of Inquiry into inland waterways, known as the Bowes Committee, set up in February, 1956. The report was published in July, 1958 (see [1958] P.L. 398-399).

The White Paper points out that most of the recommendations would require legislation, much of it of a very complicated nature, and therefore the Government feels it desirable to try out some of the Bowes Committee's ideas experimentally, before reaching final decisions on the form of legislation. The present proposals, therefore, set out an interim policy to cover a period, possibly, of some two years.

The Government accepts the recommendation that the main effort should be directed to the development of the waterways designated by the committee as Class A waterways (those which earn their keep as commercial navigations, mainly the big barge navigations such as the rivers Severn, Aire and Calder), Nearly £2 million of the British Transport Commission's £5½ million programme of improvement of waterways in this class has already been spent.

The committee's report emphasised that, apart from their use for transport, canals may be valuable for drainage, water supply, recreation or amenity. For Class C waterways (those considered by the committee to have no further value for commercial navigation, many of them being derelict or semi-derelict), the Government will set up at once an Inland Waterways Redevelopment Advisory Committee, to consider and assist in the promotion of redevelopment schemes. This committee will consist of members knowledgeable about the various interests concerned with redevelopment, including local authorities, boat users and operators, industry, farming, land drainage, and water supply. It is expected that the British Transport Commission, as owners of most of these waterways, will generally initiate schemes, but it will be open to other interested bodies to do so. The experience gained during the trial period, and the degree of success achieved in redeveloping canals no longer used for transport, will influence the shape of the permanent legislation which can be introduced later.

The Government expects that the cost of redevelopment will be borne by those who benefit from it, and that, where beneficiaries are not now paying a fair economic price for the services they receive, they will do so in the future. If work proposed for carrying out redevelopment schemes is eligible for Government grant under existing legislation, applications will be sympathetically considered. It is also intended to obtain Parliamentary authority for special *ad hoc* grants towards bridging small gaps in the capital cost of redevelopment schemes in certain cases.

The Government welcomes the interest which the National Trust is showing in the possibility of taking over and preserving for the nation lengths of waterway of particular beauty or historic interest.

As regards Class B canals (those which, while unable to pay their way, are still of value for the commercial carriage of goods), the Government feels that, during the experimental period, it would not be justified in spending the substantial sums necessary to put them fully into good condition and to cover possible operating losses. It will be possible for the British Transport Commission and other interested bodies to propose schemes for their redevelopment, and these will be eligible for Government assistance on the lines described above.

The recommendations of the Bowes Committee concerning the Caledonian and Crinan canals and the main line of the Forth and Clyde canal are stated to raise important issues, and are being further considered by the Government.

The Government proposes to leave open for further consideration during the experimental period the question of the future administration of the canals, on which the Bowes Committee was divided: some members recommended that responsibility should remain with the British Transport Commission, while others favoured the setting up of an Inland Waterways Corporation. In the meantime, the commission have informed the Government that they intend to strengthen the composition of their waterways sub-commission, as proposed in the report (Cmd. 676 published on February 23, 1959; for debate, see 214 H.L. Deb. 311-338, February 17, 1959; Commonwealth Survey, C.O.L., March 3, 1959).

See also LOCAL GOVERNMENT (above, p. 172).

PARLIAMENT

Estimates Committee (House of Commons)

Report. The Select Committee on Estimates has published its 3rd Special Report containing observations of the Admiralty and the Treasury on the 8th Report of 1956-57 (on War Histories) (H.C. 4 of 1958-59).

Member for Wednesbury (Mr. Stonehouse)

On several occasions during March, 1959, the House of Commons debated the action of the Government of the Federation of Rhodesia and Nyasaland in declaring Mr. Stonehouse M.P. a prohibited immigrant. The Speaker gave his reasons for his opinion that, as Mr. Stonehouse was visiting the Federation on his own volition and with no authority from the House of Commons, there was no *prima facie* case of breach of privilege. The Speaker ruled similarly on the submission that the Member had been prevented from attending the House (601 H.C. Deb. 40-59, March 2, 1959; 208-212, 223-227, March 3, 1959; 454-464, 519-583, March 4, 1959; see also 214 H.L. Deb. 650-652, March 3, 1959). On March 13, 1959, Mr. Stonehouse made a personal statement (601 H.C. Deb. 1613-1617). On powers of Federation over immigration, see 215 H.L. Deb. 194-196, March 24, 1959.

Offices (House of Lords)

Report. The Second Report from the Select Committee on the House of Lords offices has been published. It concerns officers of the House and other matters (H.L. (80) of 1958-59; 215 H.L. Deb. 69-71, March 19, 1959).

Private Bills

Promotion. On February 3, 1959, the House of Lords appointed seven members of the joint committee of the two Houses to consider the extent to which proposed private Bill enactments which would alter the powers or duties of persons other than the promoter should be allowed (213 H.L. Deb. 1009; see above, p. 76).

Procedure

Select Committee. The Select Committee appointed to consider the procedure in the Public Business of the House has presented its report under the following heads: introduction; legislation, public Bills, general proposals; public Bills, private members' time; private Bills; morning sittings; debate; motions for the adjournment; divisions; questions; supply and the estimates; committees; miscellaneous; conclusion and summary of recommendations (H.C. 92 of 1958-59).

Public Accounts Committee (House of Commons)

Reports. The Committee has presented a Special Report (Treasury Minute and Abstract of Appropriation Accounts) (H.C. 76 of 1958-59) and its 1st Report (Excess Votes) (H.C. 93 of 1958-59).

Statutes

Royal Assent. The Malta (Letters Patent) Act, 1959 (7 & 8 Eliz. 2, c. 14) received the Royal Assent on February 19, 1959 (see below, p. 197); the Transport (Borrowing Powers) Act, 1959 (c. 16) (see above, p. 188), the Family Allowances and National Insurance Act, 1959 (c. 18) (see below, p. 193), the Electricity (Borrowing Powers) Act, 1959 (c. 20) (see above, p. 188), the County Courts Act, 1959 (c. 22) (see above, p. 169), and the Overseas Resources Development Act, 1959 (c. 23) (see below, p. 194) received the Royal Assent on March 25, 1959.

Women peers

On January 21, 1959, the House of Lords agreed to a resolution that steps should be taken to obtain leave to introduce legislation to confer upon such women peers as, under existing conditions, were not qualified to take their seats, the same rights, duties and privileges as were enjoyed by hereditary peers having seat, place and voice in the House (213 H.L. Deb. 612-614).

See also SUBORDINATE LEGISLATION (below, p. 192).

PUBLIC AUTHORITIES**Central Land Board**

Account of the payments of the Board on planning payments (war damage) scheme and the sums issued out of the Consolidated Fund for 1957-58 has been published, together with the report of the Comptroller and Auditor General thereon (H.C. 69 of 1958-59).

Dissolution. On March 19, 1959, the House of Commons approved the Central Land Board (Dissolution and Transfer of Functions) Order, 1959, a draft of which had been laid before the House (602 H.C. Deb. 763-765, March 19, 1959; 914, March 23, 1959).

General Optical Council

An Order has been made for an increase of one in the membership of the Council by the nomination by the Privy Council of an additional lay member (S.I. 1959 No. 412).

Iron and Steel Board

Statement has been published made by the Minister of Power of his determination, with Treasury approval, in regard to the remuneration (£8,500), allowances and provision of pension to Sir Cyril Musgrave, K.C.B., chairman of the Board (H.C. 107 of 1958-59).

New Towns

Accounts have been published showing the sums issued out of the Consolidated Fund and the advances made therefrom to Development Corporations for 1957-58, together with the report of the Comptroller and Auditor-General thereon (H.C. 81 of 1958-59).

SCOTLAND**Town and country planning**

Legislation. On February 3, 1959, the Secretary of State said that he could not yet say when it might be possible to consolidate Scottish town and country planning legislation. He also set out his reply to the Faculty of Advocates on the Town and Country Planning Bill giving reasons why there had not been separate Scottish legislation (599 H.C. Deb. 27-28).

See also LOCAL GOVERNMENT (above, p. 172); NATIONAL HEALTH SERVICE (above, p. 180); NATIONALISED INDUSTRIES (above, p. 188).

SUBORDINATE LEGISLATION

Parliamentary proceedings

Select Committee on Statutory Instruments (House of Commons). On January 27, February 10 and 24, and March 10 and 24, 1959, the Committee considered 64, 18, 12, 16 and 28 instruments respectively and resolved that it was unnecessary to draw the special attention of the House to them. The Committee asked for a memorandum from the Lands Commissioner of the Treasury in respect of one instrument (H.C. 5-V, 5-VI, 5-VII, 5-VIII, 5-IX).

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

General

Council on Tribunals. To the list of members printed on p. 81 above should be added the name of Sir Hugh Rose (the chairman of the Scottish Committee).

Tribunals and Inquiries Act, 1958. The Tribunals and Inquiries Act, 1958 (Commencement) Order, 1959, provides that April 1, 1959, is to be the appointed day for the purpose of sections 8, 9 and 12 of the Tribunals and Inquiries Act, 1958. Section 8 requires the Council on Tribunals to be consulted before the making of procedural rules, section 9 provides for an appeal to the High Court or the Court of Session on a point of law from the decisions of certain tribunals, and section 12 makes provision for the giving of reasons for decisions of tribunals and Ministers (S.I. 1959 No. 451).

The Tribunals and Inquiries (Revenue Tribunals) Order, 1959, excludes from the operation of section 12 (1) of the Tribunals and Inquiries Act, 1958 (which requires the tribunals to which the section applies to furnish a statement of the reasons for a decision if so requested), decisions of the Board of Referees and decisions of Income Tax Commissioners to which the appeal procedure by way of Case Stated under the Income Tax Act, 1952, applies (except decisions of the Special Commissioners in cases in which a re-hearing by the Board of Referees may be required) (S.I. 1959 No. 452).

Agricultural Land Tribunals

The Agricultural Land Tribunals and Notice to Quit Order, 1959, prescribes new rules of procedure for Agricultural Land Tribunals.

It also requires certain questions arising under section 24 (2) of the Agricultural Holdings Act, 1948, to be determined by arbitration, and provides for the extension of the time within which counter-notices may be served and for the suspension and postponement of the operation of notices to quit when proceedings are taken (S.I. 1959 No. 81).

The Agriculture (Control of Notices to Quit) (Service Men) Order, 1959, has been made (S.I. 1959 No. 82).

The Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951, provides that, in certain circumstances, a tenant of an agricultural holding who is performing a period of service shall have special protection in addition to that given by the Agricultural Holdings Act, 1948. In particular, when a notice to quit the holding states reasons which would, but for the special protection, deprive a tenant of his right to serve a counter-notice under section 24 (1) of the 1948 Act, the service man may still have the right to do so. This Order provides that in cases where the operation of the 1948 Act is modified in this way, the Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959/81) shall be modified accordingly (S.I. 1959 No. 82).

The Agriculture (Areas for Agricultural Tribunals) Order, 1959, made by the Lord Chancellor under powers transferred to him from the Minister of Agriculture, Fisheries and Food by section 5 of the Agriculture Act, 1958,

consolidates without alteration (with effect from the appointed day under that Act, viz., January 26, 1959) the provisions previously made by the Minister for constituting areas in England and Wales for Agricultural Land Tribunals (S.I. 1959 No. 83).

The Agricultural Land Tribunals (Amendment) Order, 1959, substitutes new forms for applications to Agricultural Land Tribunals under section 4 of the Agricultural Act, 1958, which enables a tribunal to give directions about the provision, alteration or repair of fixed equipment (S.I. 1959 No. 359).

Family Allowances and National Insurance

The Family Allowances and National Insurance Act, 1959 (7 & 8 Eliz. 2, c. 18) received the Royal Assent on March 25, 1959. This provides that certain provisions of the National Insurance Act, 1946, relating to the determination of claims and questions shall apply to the determination of questions arising under the Family Allowances Act, 1945. The Act also gives a right of appeal in point of law from medical appeal tribunals to the Industrial Injuries Commissioner. It also provides that leave shall not be required for appeals under section 47 of the N. I. (I. I.) Act, 1946, from decisions of local appeal tribunals.

Land acquisition for defence purposes

Inquiries. On March 6, 1959, the Secretary of State for War detailed a new procedure for compulsory purchase in cases outside the ambit of the Land Powers (Defence) Act, 1958 (601 H.C. Deb. 69-73).

The procedure in cases falling within that Act is set out in new Rules (S.I. 1958 No. 2231; see S.I. 1959 No. 376 for Scotland).

Patents Appeal Tribunal

The Patents Appeal Tribunal Rules, 1959, provide that the Appeal Tribunal may either of its own motion or on the application of any party, direct that the appeal be heard in public or, as the case may be, that the decision of the Tribunal on the appeal shall be given in public (S.I. 1959 No. 278).

Transport Tribunal

Proceedings have been published in the matter of the application of the British Transport Commission; to confirm the British Transport Commission (Passenger) Charges Scheme, 1958; fifth to twenty-first days (H.M.S.O. 88-817-5 to 21).

WALES

Council for Wales and Monmouthshire

In January, 1959, were published the Fourth Memorandum by the Government Administration Panel of the Council, sent to the Prime Minister on May 15, 1958, and the Prime Minister's reply of July 5, 1958 (Cmnd. 631).

Developments and Government action

The report for the period July 1, 1957, to December 31, 1958 has been published (Cmnd. 684).

WIRELESS AND TELEVISION

British Broadcasting Corporation

Political rights of staff. On March 6, 1959, the House of Commons debated this question on the adjournment (601 H.C. Deb. 839, 841-852).

Independent Television Authority

Account has been published of the sums issued to the Postmaster-General out of the Consolidated Fund and of sums received by him and paid into the Exchequer during 1957-58 in respect of advances to the Authority, together with the report of the Comptroller and Auditor General thereon (H.C. 87 of 1958-59).

Parliamentary elections

On March 24, 1959, the House of Commons discussed the television arrangements (602 H.C. Deb. 1122-1129).

Policy

On February 25, 1959, the House of Commons debated television policy and the future of television (600 H.C. Deb. 1253-1264).

COMMONWEALTH AND DEPENDENT TERRITORIES**General**

Colonial development. The report has been published on the use of funds provided under the Colonial Development and Welfare Acts and the outline of the proposal for Exchequer loans to colonial territories (Cmnd. 672).

Overseas resources. The Overseas Resources Development Act, 1959 (7 & 8 Eliz. 2, c. 23) received the Royal Assent on March 25, 1959. It consolidates the Acts, 1948 to 1958, other than the provisions relating to the Overseas Food Corporation.

Aden

Protectorate. On February 3, 1959, the Secretary of State for the Colonies circulated a statement which said that agreement had been reached among six States of the Western Aden Protectorate on a constitution for the proposed Federation of Arab Amirates of the South (599 H.C. Deb. 44-45). The Federation was inaugurated on February 11, 1959.

Bahamas

Report. The Colonial Report, 1956 and 1957, has been published by the Colonial Office.

Basutoland

Constitution. The White Paper giving details of the proposed constitution has been published (Cmnd. 637, and see above, p. 84).

Brunei

Report. The Colonial Report, 1957, has been published by the Colonial Office.

Cyprus

Constitution. An agreement on independence for Cyprus providing for continued United Kingdom sovereignty over certain bases on the island was signed in London on February 19, 1959.

The future State of Cyprus is to be a Republic with a presidential régime, the President being Greek and the Vice-President Turkish, to be elected by universal suffrage by the Greek and Turkish communities

respectively. They will each have the power of final veto over legislation and decisions of the Council of Ministers on foreign affairs and defence and security matters. They will also have, separately and conjointly, the right to return all laws and decisions to the House of Representatives for reconsideration. The proportions of Greek to Turkish Cypriots in the various branches of the government and administration would be: in the Council of Ministers, seven to three; in the House of Representatives 70 per cent. for the Greek community to 30 per cent. for the Turkish community; in the army (totalling 2,000) 60 per cent. to 40 per cent.; the security forces (gendarmarie and police, also totalling initially 2,000), 70 per cent. to 30 per cent. (for an initial period this may be raised to a maximum of 40 per cent. of Turks to 60 per cent. of Greeks). The proportions in the Civil Service would be 70 per cent. to 30 per cent. A high court of justice will consist of two Greeks, one Turk and one neutral.

Each community is to have its Communal Chamber, composed of a number of representatives which it shall itself determine. They will have the right to levy taxes for the needs of their respective communities, and will exercise authority over, *inter alia*, all religious, educational, cultural and teaching questions, and over those questions where the interests and institutions are of a purely communal nature (e.g., sporting and charitable foundations). In the five largest towns of Cyprus, separate municipalities are to be created by the Turkish inhabitants.

A treaty of guarantee for the new State is to be concluded between the Republic of Cyprus, Greece, the United Kingdom and Turkey. Under it the future Republic undertakes "not to participate" in any union with any State and prohibits all activity tending to promote either union or partition of the island. The three countries give similar undertakings with regard to Cyprus, and may take action jointly or singly to ensure that these provisions are observed. A treaty of military alliance is to be concluded between the Republic of Cyprus, Greece, and Turkey. These two instruments are to have constitutional force. A tripartite defence headquarters will be established by Greece, Turkey and Cyprus in the island.

It is provided that United Kingdom sovereignty will be maintained over two areas of the island, which will comprise the British bases, the necessary rights and facilities for the operation of the bases to be secured to the United Kingdom Government. The two areas over which sovereignty will be maintained are specified as (a) Akrotiri—Episkopi—Paramali and (b) Dhekelia—Pergamos—Ayios Nikolaos—Xylophagou.

The constitution and treaties are to come into force as soon as possible, and, in any case, within a year. The first of the measures leading to transfer of sovereignty, which are to begin at once, will be the immediate establishment of:

- (a) a joint commission in Cyprus, to complete a draft constitution incorporating the basic structure already agreed;
- (b) a transitional committee in Cyprus, to draw up plans for adapting and reorganising the Government machinery in Cyprus in preparation for the transfer of authority, and
- (c) a joint committee in London, with the duty of preparing the final treaties giving effect to the conclusions of the London Conference. It will prepare drafts for submission to Governments, covering, *inter alia*, the retention of areas in Cyprus under British sovereignty, questions of nationality, and financial and economic problems arising from the creation of an independent Cyprus.

(For the documents of the agreement, see Cmnd. 679, 680; see also 599 H.C. Deb. 1356–1359, February 12, 1959; 600 H.C. Deb. 618–630, February 19, 1959; 214 H.L. Deb. 431–438, February 19, 1959; for a subsequent debate, see 602 H.C. Deb. 639–763, March 19, 1959; Commonwealth Survey, C.O.I., March 3, 1959.)

Falkland Islands

Report. The Colonial Report, 1956 and 1957, has been published by the Colonial Office.

Fiji

Report. The Colonial Report, 1957, has been published by the Colonial Office.

Kenya

Constitution. On March 26, 1959, the House of Commons debated the situation (602 H.C. Deb. 1500-1501, 1549-1567).

Malta

Constitution. A statement was issued by the Colonial Office on January 5, 1959: "Her Majesty's Government have carefully considered the views put forward during the constitutional discussions between the Secretary of State for the Colonies and the delegations representing the Malta Labour Party, the Nationalist Party and the Progressive Constitutional Party, which were held in London between November 19 and December 21, 1958. Because these talks failed to reach agreement on a new constitution, Her Majesty's Government have now had to decide on constitutional arrangements for an interim period.

It will be recalled that Malta has been without an elected government since April, 1958, when Mr. Mintoff resigned and Dr. Borg Olivier declined to form a government. At the same time, disturbances threatening public safety broke out, which necessitated the proclamation of an emergency. Since then, the Governor has had to use his emergency powers to govern Malta. In the situation created by these events, the Secretary of State for the Colonies decided to invite the three political parties to London last November to discuss future constitutional arrangements.

In their approach to these discussions, Her Majesty's Government naturally had regard to the negotiations which had taken place over the past three years for the integration of Malta with the United Kingdom. Although the integration negotiations have not borne fruit, and none of the Maltese political parties now accepts integration as an aim of policy, Her Majesty's Government felt that the far-reaching self-government which Malta would have enjoyed under integration provided a suitable basis for discussion of any new constitutional plan. The Secretary of State for the Colonies was, accordingly, prepared to discuss with the Maltese delegations, at the talks, a new constitution drawing its inspiration from those constitutional arrangements under integration on which there had been a substantial measure of agreement. This new constitution would have given Malta self-government in most fields. Her Majesty's Government would have retained responsibility for defence and external affairs, for assuring the independence of the police and the public service, and their protection from victimisation. This constitution was based on the continuing close association between the United Kingdom and Malta, which Her Majesty's Government firmly believe corresponds to the wishes and interests of both countries.

The Secretary of State for the Colonies hoped that, after an initial meeting with each of the delegations, there could be a plenary conference with all three delegations. That proved to be impossible.

The Labour Party delegation, at the two meetings held with them, and in correspondence between Mr. Mintoff and the Secretary of State, took the view that any constitutional arrangements for the future must be on the basis of immediate independence, or independence by 1962. They persisted in that view, after it had been pointed out to them that the people of Malta would suffer mass unemployment and serious economic hardship if Malta were to

become independent now, or in the near future. The attitude of the Labour Party delegation made it fruitless to attempt to discuss any detailed constitutional arrangements with them. There was a valuable general discussion on future constitutional arrangements with the Nationalist Party delegation, but the party required more precise assurances on Malta's eventual position in the Commonwealth than Her Majesty's Government were in a position to give. There was also a useful exchange of views with the Progressive Constitutional Party.

There is evidently no prospect at present of devising a constitution for Malta which would be generally acceptable to the political parties and Her Majesty's Government. Further efforts must, of course, be made, and it is Her Majesty's Government's intention to hold further discussions in due course with a view to reintroducing elected representative government. In the meantime it is desirable that the present arrangements, under which the Governor is using his emergency powers under the present constitution to govern the islands, should be terminated as soon as possible. Her Majesty's Government have, accordingly, no alternative but to revoke the present constitution, and to make special arrangements of an interim character for the government of Malta. This will necessitate legislation, and a Bill will be introduced into Parliament after the House reassembles. The form of government contemplated for this interim period is one in which the Governor will be assisted by a council on which there will be Maltese representation."

The Malta (Letters Patent) Act, 1959 (7 & 8 Eliz. 2, c. 14) received the Royal Assent on February 19, 1959. It empowers Her Majesty by Order in Council or by Letters Patent, to revoke or amend the Malta (Constitution) Letters Patent, 1947, as amended. During the second reading on February 2, 1959, the Secretary of State for the Colonies said that it was the Government's intention to advise Her Majesty to revoke the present constitution and replace it by interim arrangements which, would vest for the time being, the power to make laws and the executive authority in the Governor who would be advised by a Council with official and Maltese unofficial nominated members (see 598 H.C. Deb. 1-5, January 20, 1959; 599 H.C. Deb. 37-160, February 2, 1959; 601 H.C. Deb. 203-204, March 3, 1959).

Mauritius

Report. The Colonial Report, 1957, has been published by the Colonial Office.

Nigeria

The Nigeria (Constitution) (Amendment) Order in Council, 1959, amends certain provisions of the Nigeria (Constitution) Order in Council, 1954, relating to the Northern Region, to the public service and to finance (S.I. 1959 No. 368).

The Nigeria (Offices of Governor-General and Governors) (Amendment) Order in Council, 1959, amends the provisions of the Nigeria (Offices of Governor-General and Governors) Order in Council, 1954, as amended, relating to the discharge of the Governor-General's and Governors' functions by a deputy, the Privy Councils of the Regions and the constitution of offices (S.I. 1959 No. 369).

Rhodesia and Nyasaland

Northern Rhodesia. The Northern Rhodesia (Legislative Council) Order in Council, 1959, has been made.

Part II of this Order makes provision for a Legislative Council for Northern Rhodesia consisting of a Speaker, four *ex-officio* members, twenty-two elected members, two nominated official members and two nominated unofficial members. It also makes provision with respect to the constituencies for which the elected members are to be returned and prescribes qualifications

for registration as an ordinary or special voter for the purpose of electing those members. Part III of the Order reproduces with minor amendments the effect of the existing provisions with respect to the powers and procedure of the Council (S.I. 1959 No. 105).

Nyasaland. Events which led up to the declaration of a state of emergency in Nyasaland on March 3, 1959, were described in a series of statements in Parliament on various dates.

On February 25, the Under-Secretary of State for the Colonies, Mr. Amery, spoke of the disturbances which had been taking place in the protectorate: "In carrying out their campaign for the secession of Nyasaland from the Central African Federation and for immediate self-government, the Nyasaland African Congress has recently been organising a number of meetings, some of which were unauthorised. These culminated, on February 20, in an incident at Karonga, in the Northern Province, in which a crowd of Africans attacked the police station and released a prisoner. During this disturbance an African district assistant was injured and three African families in the police lines were attacked and injured."

Mr. Amery went on to describe other incidents in which several people, both African and European, were injured, and concluded: "To meet the situation the Governor has made full use of the police at his disposal and, at his request, the Northern Rhodesia Government have lent two platoons of mobile police. In addition, and also at the Governor's request, one battalion of the King's African Rifles has been sent to Nyasaland from Northern Rhodesia."

On March 3, the Secretary of State for the Colonies informed the House of Commons that the situation in Nyasaland continued to be so dangerous, and there was such clear indication of the intention of Congress to stir up further disturbances, that the Governor had been compelled to declare a state of emergency. Leading members of the Congress, including Dr. Banda (its President-General), had been detained and removed to Southern Rhodesia, where they would be held so long as the Governor of Nyasaland thought necessary. He added:

"I am sure that this action was necessary in the interests of people of all races in Nyasaland, including the great majority of peaceful and law-abiding Africans whose lives and property have been threatened by the violence instigated by the Nyasaland African Congress. When order has been restored, Her Majesty's Government will certainly resume with the Governor consideration of what constitutional reforms may be appropriate."

In the course of a debate on the adjournment the same day, the Secretary of State for the Colonies spoke again about the reasons for declaring a state of emergency. Some days earlier, he said, information had come to the notice of the Governor of Nyasaland which was of a very serious kind. "That information made it clear that plans had been made by Congress to carry out widespread violence and murder of Europeans, Asians and moderate African leaders; that, in fact, a massacre was being planned."

Statements made in reply to questions on March 10 and 12 indicated that, although there had continued to be a number of incidents and some casualties, the situation was gradually improving, particularly in the main centres of population.

Discussions on Nyasaland's constitution have been going on in the protectorate for several months. It had been proposed that Lord Perth, Minister of State for Colonial Affairs, should go to Nyasaland at the end of February to hear the views of all concerned and to make recommendations; but in view of "the background of violence and unrest" it was decided on February 27 to postpone the visit. On March 11, however, it was announced that Lord Perth would go to Nyasaland on the following day, and after spending a few days there, would visit Salisbury, the capital of the Federation of Rhodesia and Nyasaland, before returning to London. The official announcement of

his visit stated: "He will not, at this stage, be able to undertake formal consultations regarding constitutional changes in Nyasaland, but one of the purposes of his visit will be to look into the question when it will be possible to take this matter up again."

(See 600 H.C. Deb. 1122-1126, February 25, 1959; 1459-1464, February 27, 1959; 601 H.C. Deb. 216-223, 279-346, March 3, 1959; 214 H.L. Deb. 647-648, 670-672, 717-746, March 3, 1959; 812-817, March 5, 1959; 601 H.C. Deb. 1059-1072, March 10, 1959; 1452-1456, March 12, 1959; Commonwealth Survey, C.O.I., March 17, 1959.)

On March 18, 1959, the Governor of Nyasaland addressed to the Secretary of State a dispatch covering the events leading up to the publication on March 3, 1959, of a declaration of a state of emergency in the Protectorate of Nyasaland under the provisions of the Emergency Powers Orders in Council, 1939 and 1956. This dispatch has been published (Cmd. 707).

On March 24, 1959, the Secretary of State announced the setting up of a Commission of Inquiry (Chairman: Devlin J.) (602 H.C. Deb. 1133-1138; see also 1336-1351, 1352-1358, March 25, 1959; 1506-1511, March 26, 1959).

On March 24, 1959, the House of Lords discussed the general situation of unrest in Nyasaland (215 H.L. Deb. 198-363).

Southern Rhodesia. The question was raised in Parliament of the arrest and detention of Mr. Clutton Brock (601 H.C. Deb. 601-603, March 5, 1959; 602 H.C. Deb. 587-598, March 18, 1959; 215 H.L. Deb. 196-197, March 24, 1959).

See also PARLIAMENT (above, p. 190).

Saint Helena

Report. The Colonial Report, 1956 and 1957, has been published by the Colonial Office.

Somaliland

Constitution. The following statement of policy on the future of British Somaliland was issued by the Secretary of State for the Colonies, Mr. Lennox-Boyd, at Hargeisa on February 9, 1959:

"Last November, the Governor announced certain constitutional advances and, after the forthcoming elections, the Protectorate will have, for the first time, a Legislative Council which includes elected members, and some of these elected members will be making themselves familiar with the work of some departments of Government.

When he made his statement, the Governor made it clear that further constitutional progress was being planned. In considering this matter, Her Majesty's Government have thought it right to pay special regard to the fact that the neighbouring territory of Somalia is due to become independent when the trusteeship agreement between the United Nations and the Italian Government comes to an end in December, 1960. In these special circumstances, Her Majesty's Government think that there is justification for proceeding with constitutional development in the Protectorate at a faster pace than they believe to be suitable or advantageous in more normal circumstances elsewhere. I can now say that it is the intention of Her Majesty's Government that, by the end of 1960, there shall be an elected unofficial majority in the Legislative Council, together with a ministerial system under which a number of unofficial members of the Legislative Council will become members of the Executive Council with executive responsibilities in government.

These changes will raise important issues which will need to be considered. The Governor intends shortly to appoint a commission to make recommendations to him on the number of representative members in the next Legislative Council, the method of their selection, constituencies and similar matters. This commission will also be asked to consider the place of the traditional tribal authorities in relation to the legislative and executive organs

of government and how these authorities may best be associated with the future working of the constitution.

The changes foreshadowed for 1960 will also involve a reorganisation of the government machine, and some adjustment of the present budgetary arrangements. The Governor proposes to set in train the necessary examination of these problems at once, so that, in due time, recommendations can be made to me about any changes which should be made in the present arrangements.

By the end of 1960 there will thus be an unofficial majority in the Legislative Council, and Somalis with executive responsibility in the Government. Thereafter, it is the intention of Her Majesty's Government to arrange such further constitutional steps as may be necessary to lead to early self-government.

Her Majesty's Government is aware of the desire expressed by many Somalis of the Protectorate that there should be a closer association between this territory and Somalia. If, therefore, when Somalia has become independent, the Legislative Council of the Protectorate formally resolves that negotiations with the Government of Somalia be instituted to determine the terms and conditions on which a closer association of the two territories might be achieved, Her Majesty's Government in the United Kingdom would be ready to transmit this resolution to the Government of Somalia and inquire whether that Government would be willing to enter into negotiation. If so, Her Majesty's Government would arrange for negotiations of a suitable nature to take place.

Whatever the eventual destiny of the Protectorate, Her Majesty's Government will continue to take an interest in the welfare of its inhabitants, and will, in the light of the circumstances prevailing from time to time, be prepared to give sympathetic consideration to the continuation of financial assistance within the limits of the amount of aid at present being provided to the Protectorate" (599 H.C. Deb. 159-160, February 9, 1959).

An Order in Council has been made amending the Somaliland (Constitution) Order in Council, 1955, by enlarging the membership of the Legislative Council, and enabling members to be elected thereto (S.I. 1959 No. 104).

Tanganyika

Constitution. The Secretary of State said that on March 17, 1959, the Governor announced the terms of reference of a committee (chairman: Sir Richard Ramage) to examine such matters as the number of elected members in the Legislative Council, the present voting system, qualifications for candidates and voters and the possibility of establishing a Territorial Council. The Governor also announced the intention to invite five unofficials to take up Ministerial portfolios in the Government; these with seven official Ministers would comprise the Council of Ministers which would on July 1, 1959, take over the primary duties of the Executive Council (602 H.C. Deb. 1504-1505, March 26, 1959).

Tonga

Report. The Colonial Report, 1956-57, has been published by the Colonial Office.

Uganda

In an exchange of correspondence between the Governor of Uganda and the Secretary of State for the Colonies, issued as a supplement to the *Uganda Gazette* of November 7, 1958, approval was given to certain minor changes in the Executive and Legislative Councils of Uganda. Their principal effect is to reallocate the work between certain Ministries and to increase the number of African members of the Legislative Council from 33 to 34, by providing for the appointment of a third African Parliamentary Secretary.

The Executive Council, under the presidency of the Governor, now consists of 3 *ex-officio* members, 4 other official members (of whom 3 are Ministers) and 5 Ministers drawn from the public (of whom 3 are Africans, one a European, and one an Asian). The three African Parliamentary Secretaries are not members of the Executive Council, although they form part of the Government.

The Legislative Council is presided over by a Speaker and has 62 members; 30 on the representative side (18 Africans, 6 Europeans and 6 Asians), and 32 on the Government side (11 Ministers, 3 Parliamentary Secretaries, 3 nominated official members and 15 nominated unofficial members). The Governor has power to vary the number of nominated official and unofficial members so long as the total remains at 18.

In making his proposals for these changes, the Governor stated his intention "always so to arrange the selection of back-bench members on the Government side that at least half of the total number of members of the whole Council are Africans" (Commonwealth Survey, C.O.I., January 20, 1959).

BOOK REVIEWS

THE FOUNDATIONS OF POLITICAL THEORY. By H. R. G. GREAVES. [George Allen and Unwin. 1958. 208 pp. 21s.]

"THE student of politics asks why he should prefer one kind of political organisation to another. He wants to know what a political organisation should aim at, and by what criteria he is to judge its ends, its methods, and its achievements. He inquires, too, why he should obey, and if there are even occasions when he should not. These are not 'improper questions,' and they will continue to be asked. . . . This is, then, to deny the view that political science can only describe behaviour without attempting its systematic appraisal, or that the search for unifying concepts or basic principles for general guidance is mistaken and unprofitable." So Mr. Greaves in his Foreword. Towards the end of this unfashionable and important book, he refers to a recent tendency in writings about political science "to aver that, being a science, it can have nothing to do with values, that it cannot describe objectives" and that "we cannot say anything useful about objectives because these are too vague, commonplace, or uncertain." Mr. Greaves will have none of this: "We have rejected this abdication and have claimed that what the State should aim at is the very essence of political studies."

And so Mr. Greaves' chapter headings speak of purpose, obligation, command, reason, morality, values and the social good. In approach, the anti-thesis to this book is Weldon's *The Vocabulary of Politics*. Mr. Greaves is therefore attempting the most unpopular of tasks: the insistence on the superior merits of orthodoxy over a young and healthy heresy. How difficult it is to react without being reactionary. How difficult it is to be logical and positive when the enemy has taken the words on your arms for his motto.

The dispute is very real and quite fundamental. It appears in many forms: in pure and applied philosophy, in pure and applied politics, in pure and applied religion.

"There is one sin: to call a green leaf grey
Whereat the sun in heaven shuddereth."

Any reviewer of such a book as this ought to be biased. And I should say at once that I am strongly biased in its favour. I believe that it stands for the forces of light against the forces of darkness. My main point of difference with Mr. Greaves is that I believe we have the angels on our side. And he does not.

Mr. Greaves is a humanist. He writes: "Though experts in ethics or philosophy may disagree as to why they think a thing good they nevertheless have little difficulty in arriving at a common identification of good in many, or even most, cases. Undoubtedly there is this body of widespread agreement, which may even reach to universal acceptance at a given time and place, but we should be wary of ascribing to it therefore the quality of ultimate authority, or of claiming its force on that ground, for we must not forget the subjective element in all judgment" (p. 70). So he finds the reasons for the keeping of order to be those of social convenience, and in calling the truth to be its own reliability and predictability—"it is a more satisfactory social arrangement than its obverse" (p. 120). . . . "For we cannot escape the dilemma. If our morality is absolute, being something ordered by an authority beyond man, or morality, on the other hand, is

which expresses human purposes" (p. 96). It is a little alarming that Mr. Greaves should say that the first alternative (which, of course, is the one he rejects) implies a system working "without regard to human purposes" because this seems to me to confuse the matter. No doubt it is possible to believe in an objective morality which disregards human purposes but the more usual "absolute authority beyond man" is religious which is often (as in the Christian religion) believed to be concerned with human purposes. It is unfair to say that Mr. Greaves identifies objective morality with religious belief but he comes very close to that fallacy. Elsewhere he writes about religion when allied with secular authority strengthening the institutions of civil society—"Behind the law is morality and behind morality revelation" (p. 135) and on the next page he talks of the relation between class and religious belief in Victorian England. Now nothing is easier than to find examples of secular authorities giving moral or religious reasons why they should be obeyed or to show how social distinctions attract types of religious belief. But this has nothing to do with the fundamental differences between a humanist and a religious belief. This is so clear that we must acquit Mr. Greaves of the fallacy. But what of this? "A doctrine which instructs a man to accept moral principles because of their origin, or to resign his will in favour of 'revelation,' by insisting that there is no need for him to think out rationally an integration of his own experience, denies the foundation of morality and teaches him habits which inhibit its development in him" (p. 200). I completely agree. But what doctrine is this? Surely it is not that which Aquinas accepted? Does Mr. Greaves quite understand that a religion like Christianity is not first a code of morality, a collection of precepts, a way of life, a be-kind-to-dumb-animals-and-don't-go-to-bed-with-strange-women miscellany, but a belief based on direct experience of the existence of God? To quote him again: "The authoritarian system is wrong because it is based on a wrong reading of human nature. This it postulates as evil—since the Fall from Grace—and therefore to be exorcised, hated and suppressed by force. The truth is that it is better to teach by love and patience than by force and fear" (p. 194). But. The authoritarian system cannot be wrong because of its reading of human nature. It does not base itself on human nature. It is the humanist who does that. The authoritarian system bases itself on the nature of God. And the Christian God at least is surely identified a little more with love and patience than with force and fear.

But to return to Mr. Greaves's ground. "We may well ask what it is that causes men, whether rulers or not, to do what is evil according to the 'canons of social value established by civilisation.' May it not be that they wish to enforce what for us today are unaccepted values, of which history offers plenty of examples" and he refers to such happenings as the Catholic Inquisition, the Bolshevik killing of kulaks or capitalists, and the Nazi butchery of Jews or Socialists. "But is not each of these justified to those who do the evil as in accordance with values they accept, the defence of religion or of property, or of the Communist or Nazi State? We say that they are wrong. Indeed no 'civilised' person today would doubt that they are wrong. And in doing so he would not be stating a mere dogmatic preference for other values; rather would he be reasoning from experience to certain conclusions upon which these other values were based: that men cannot be forced into religious belief, that the evidence for the belief is inadequate, that conformity imposed by fear is unconvinced and unenduring, that respect for human life and freedom of association is the condition of a society in which it is comfortable to live. . . ." What he is trying to do here, says Mr. Greaves, is "in the analysis of human needs and purposes to find the basis and character of their moral ideas" (pp. 127-128).

At the heart of the humanist difficulty. If the humanist is right and morality lies in human needs and purposes, then what is good and bad may be moral in Germany. By this the Nazi killer of

Jews is "justified" by his values. We may say we think his values are "wrong" but we cannot say they are absolutely wrong; he is "justified." And on what basis does the humanist say that the Nazi killer is wrong? Because "respect for human life . . . is the condition of a society in which it is comfortable to live"? We should not gas Jews because it is an anti-social act. But is it *absolutely* anti-social to cause the death of six million persons because they are of a particular race? Is it always, inevitably, and conclusively so? Surely the humanist cannot say this. To say that something is absolutely anti-social is contradictory, for society is relative and changes. Human purposes and needs vary and it must be possible for there to be a state of society in which such massacre is not anti-social. It might therefore conceivably be not morally wrong to carry out such a massacre. So we have two humanist propositions: first, the Nazi massacre was not wrong in itself but wrong because it was anti-social; second, given different social or human conditions, the massacre might be right. If I say that I believe these two propositions to be, quite simply, incredible, I suppose I am stating what Mr. Greaves would call "a mere dogmatic preference." Why is my preference "mere" dogmatism? The humanist's preference is equally dogmatic. And equally mere.

This review is becoming unfair because I am attacking Mr. Greaves and not praising him enough. For, without any doubt, this is a book which should be read with the care and thoroughness that has gone into its writing. Mr. Greaves is talking about questions which are at the heart of politics. It is an infinitely more valuable book than those which tell us which way a middle-class Birmingham housewife is likely to vote on a wet weekday in September. It is stimulating, well written and—dogmatic. It is in the proper classical tradition of political philosophy. It concerns moral and social behaviour and deals with that behaviour without evading the difficulties by pretending that they do not exist. Too often, as someone else said, "the trouble with our sages is not that they cannot see the answer; it is that they cannot see the riddle." Mr. Greaves sees the riddle and expounds it clearly. And he has produced a coherent, sensible, persuasive and wrong answer.

J. A. G. GRIFFITH.

CURRENT LEGAL PROBLEMS, 1956. 32s. 6d.

CURRENT LEGAL PROBLEMS, 1957, with index to volumes 1-10. Edited by G. W. KEETON and G. SCHWARZENBERGER, on behalf of the Faculty of Laws, University College, London. [London: Stevens & Sons, Ltd. 35s.]

THIS admirable series of lectures has now reached its tenth year and will undoubtedly prosper so long as current legal problems arise. It is worthy of praise for treating these problems in such a lively and stimulating manner that it is of great interest and use to layman, student and lawyer.

The twelve lectures delivered in 1956 include one by Sir Patrick Devlin in which he suggests that the judiciary should not be blamed for its failure to expand the common law, and in particular the head of public policy, to control the executive. He considers that the common law has reached its maximum growth and is incapable of further expansion. Protection for the citizen in his dealings with the executive must come from some other source. Mr. Payne, however, criticises the judiciary for its inability to perceive the true nature of its function in interpreting statutes. In his opinion the judge is the "junior partner" in the legislative process and while interpreting a statute has at his discretion to make a form of subordinate legislation. Presumably this would involve the Bench in a discussion of social problems rather than of construction and thus result in an extension of the fields of public law which Sir Patrick Devlin considers unable to expand. Professor Fitzmaurice gives a lucid examination of the problems concerning the solution of the

situation in Malta by Maltese representation at Westminster. A disturbing picture of the extent of press control and censorship in the Commonwealth is presented by Mr. Holland, who shows that it is not possible to state that all these controls are, or even were, necessary due to the insecure state of the country concerned. Mrs. Korah summarises the report of the Monopolies Commission and the Control of Restrictive Practices Bill and criticises them in the light of the laws of other countries. Some much needed revision of the Sale of Goods Act is suggested by Dr. Ivamy, but one wonders whether he is completely satisfied with the interrelationship of section 11 (1) (c), section 18, rule 1 and section 62. Professor Powell shows that the English law of contract contains no general rule relating to good faith and that, although such rules may be found in some Continental systems based on Roman law, they do not always work with success. Recent trends in air law are considered by Dr. Cheng. The ever current problem of the law on obscenity is dealt with by Mr. Lloyd. Dr. Marshall gives advice to those wishing to donate gifts in favour of sport and recreation and the Landlord and Tenant Act, 1954, is examined by Mr. Scammell. A lucid explanation of the vexed question of *mens rea* in statutory offences is presented by Professor Glanville Williams. The volume is concluded with an article by Dr. Schwarzenberger on Doctrine in International Law.

1957 saw the centenary of the Matrimonial Causes Act, 1857, and this is celebrated in *Current Legal Problems* by two lectures on the position of divorce. Sir Charles Hodson considers the development of the law of maintenance and revival, and Mr. O'Sullivan questions the advantages of easily obtainable divorces. The concept of the Commonwealth is examined by Professor FitzGerald, who would like to see it placed on a more definite footing with meetings of Commonwealth representatives empowered to make a Commonwealth policy. He would like new members to realise that their membership not merely confers rights but also involves duties. It is a pity that Professor FitzGerald was not able to continue further and suggest a skeleton constitution for this body and outline to whom it would be responsible. The problems raised by Cyprus and Singapore are discussed and contrasted by Mr. Holland. Some aspects of the Welfare State, notably the flat rate principle and the right of a workman to obtain damages from his employer as Industrial Injury benefit, are criticised by Mr. Payne. Professor Lloyd demonstrates the inadequacy of the law relating to the expulsion of members from trade unions, which was, until recently, the same as that relating to the expulsion of a gentleman from his club and characterised by the same desire for non-interference. That this is insupportable when dealing with the right of a man to earn a livelihood is admirably shown. Professor Powell questions the meaning and use of the concept of the "reasonable man." Dr. Hardy Ivamy suggests some reforms of shipping law and Mr. Scammell of the Settled Land Act, 1925. A criticism of the law of Copyright Act, 1956, is presented by Mr. Goodman. Dr. Webber reviews the trends exhibited in criminal justice in the past nine years. The unification of air law is considered by Dr. Cheng. Dr. Schwarzenberger again terminates the volume, this time with a discussion of the forms of sovereignty.

OLGA DALY.

CURRENT LEGAL PROBLEMS, 1958: Volume 11. Edited by G. W. KEETON and G. SCHWARZENBERGER, on behalf of the Faculty of Laws, University College, London. [London: Stevens & Sons, Ltd. vii and 304 pp. 35s.]

THE public lectures on "Current Legal Problems," which are reprinted in these volumes, are designed for an audience of both laymen and lawyers. It has been because of its element of popular appeal that this publication has held its unique place for the last ten years beside, but in no way in competition

with, the law reviews. However, there is considerable variation in the degree to which contributors are willing to make allowances for their audience.

One is, for instance, not surprised to find the title "Administrative Tribunals and the Franks Report" in the table of contents of the present volume. This paper makes only very light reading for a lawyer. Probably because the report could only have appeared a short time before his lecture was delivered, Professor Keeton felt compelled to devote most of the time available to him to giving a synopsis of the findings of the Committee. He merely hints at comparisons which could be made with the Attorney General's Committee on Administrative Procedure in the United States and with the work of the Donoughmore Committee. He has time to interpose only the briefest of comments on his factual material.

At the other extreme are the lectures "State Ships and State Aircraft" by B. Cheng and "Recent Charterparties" by E. R. Hardy Ivamy. Only a very select group of the lay public could appreciate these lectures. "Public Rights of Entry" by D. Waters, though the product of genuine research, is completely successful in achieving universal appeal. He demonstrates the lavishness with which administrative officials have been loaded with rights which have, throughout our history, been denied to the police. Everyone will endorse his plea that at the very least there should be some systemisation of the periods of notice which must be given to the householder and the form of authorisation which should be produced to him by the official. A contributory cause of the success of this lecture is the fact that the author was able to do justice to his subject in the time allocated to him. But in spite of the width of his title D. C. Holland achieves a similar success with "Personal Liberty in the Commonwealth." He omits all material not strictly necessary to make the points of his well-knit argument. By quotations from the relevant statutes and ordinances he reminds us that the law in the colonies concerning such matters as habeas corpus, deportation, independence of the judiciary and freedom from arbitrary arrest may be very different from the law in England. The moral which he draws from this is that we have no right to criticise others, in particular the Ghana Government, for applying the same solution as ourselves when faced with similar problems.

Of the other lectures, another which will probably be of special interest to readers of *Public Law* is that by W. O. Hart on "Local Government in London." One would have to look far to find a clearer or more concise account of the historical development of local government institutions in London. The lecturer is, however, again driven by the enormity of his subject and the short time at his disposal to give us factual information rather than his own opinions and arguments. One wonders if it would not be possible to allow some of these speakers a further hour in which to elaborate their themes. It is not only in this volume that it can be noted that the broader the subject-matter the more difficult it is for the speaker to adjust his treatment to a mixed audience.

In conclusion, special mention must be made of the lecture which was given to the Bentham Club by Sir Edwin Herbert on "Education for the Legal Profession." The fact that tentative moves are being made for the reform of the solicitor's education along the lines indicated here make this lecture of particular interest.

B. LILLYWHITE.

CONSTITUTIONAL DEVELOPMENTS IN INDIA. By CHARLES HENRY ALEX-ANDROWICZ. [Oxford University Press. 1957. viii and 255 pp. 21s.]

INDIA presents the most important example of an independent Asian country possessing a Constitution, now nine years old, largely based on Western conceptions of government. There has recently been a breakdown of this type of Constitution in Pakistan, and there are signs of a similar trend in Ceylon

and in Ghana. It is thus of importance not only to constitutional lawyers, but also to peoples throughout Asia, Africa and the free world, to discover whether the Indian Constitution is working. Professor Alexandrowicz's book is timely, for he examines critically various articles of the Constitution and the effect they have had on the courts and on the working of the governmental machine. It is not the author's intention to consider every article of the Constitution, and he has concerned himself only with such articles as he considers most important or most illuminating. With this end in view he devotes rather more than half the whole book to those articles dealing with the two topics of fundamental rights and Indian federalism. His method of approach is to base his examination of the articles upon the debates of the Constituent Assembly which drew up the Constitution, and thus he is able to compare the views of the constitution-makers with the solution of issues which have arisen in constitutional practice afterwards.

The problem of fundamental rights exercised the Constituent Assembly to a great extent. After much debate it was ultimately decided to limit the powers of the judges in this sphere for fear that otherwise the Supreme Court might become a "Third House of Parliament." The elimination from the Constitution of a "due process of law" clause deprived the courts of the power to declare certain Preventive Detention Acts unconstitutional, a power which, on a par with judges of the United States Supreme Court, they might otherwise have had. It must be appreciated, however, that an imitation of the Fourteenth Amendment of the United States Constitution would be unlikely to make any real impression upon a caste system built upon the traditions of centuries, and perhaps India's most remarkable achievement is its progress in destroying these inequalities. Even so, three articles of the Constitution had to be amended within a year of its coming into force in order to speed up, *inter alia*, social and land reforms. But the courts have not proved entirely powerless in this field. One of the seven "freedoms" conferred upon citizens by Article 19 is the right to form associations and unions, which would seem to include not merely trade unions, but also monopolies of business men and employers. Yet the author shows how the courts have been able to keep such monopolies within reasonable bounds. The Assembly had shown exceptional interest in prerogative writs and orders as remedies to protect personal liberty, and habeas corpus, mandamus, prohibition, certiorari and *quo warranto* all appear in the Constitution (thus providing a contrast with the United States Constitution). Article 32 gives the Supreme Court power to issue them "for the enforcement of Fundamental Rights," while Article 226 empowers all High Courts throughout India to issue them for the same purpose, as well as "for any other purpose." It is this last phrase which has given some trouble. Only a limited use had been made of such writs or orders before the Constitution, but afterwards it was not long before the High Courts became overloaded with cases of all kinds, most of them being brought because of some small grievance not really amounting to a ground for such an extraordinary remedy. The gradual establishment of judicial precedents has discouraged such reckless applicants. The courts have relied on the common law for guidance, and the use of the remedies has been largely restricted to those cases which would be so covered in England, and in particular they are used to facilitate judicial control of administrative power. This settlement now seems to work well, and it is an indication that although India has given up her allegiance to the Crown she has not abandoned her ties with the common law tradition.

The problems of federation in India were vastly different from those in, say, the U.S.A., Switzerland, Canada or Australia. Between the attainment of independence and 1950 the princely states had to be brought closer to, and finally into, the Union in a federal system. An outstanding feature of the Constitution is that though the existence of the federation is guaranteed it is possible to change the name or shape of any member state, or even to

abolish it or substitute some other unit or units for it. What is more, this need not even be done by an Amendment of the Constitution, but can be accomplished by an ordinary Act of Parliament. Indeed in certain cases of emergency the federation can virtually be converted into a unitary State, which is mainly why Dr. K. C. Wheare, in his book *Federal Government*, calls India a quasi-federation. In Chapter 8 Professor Alexandrowicz describes the developments that have taken place in the federal structure of India, and the way in which the formation of states is being reorganised on a linguistic basis. As he says, constitution-making is completed, but federation-making is in full swing.

Among other problems considered in this book are the rules of constitutional interpretation. It seems that although judicial decisions conflict on this the Indian rules are nearer to those subsisting in the United States than to those of statutory interpretation in England, and that the debates of the Constituent Assembly may, within certain limits, be consulted. The author would tend to favour this trend. Again, even in a detailed Constitution with 395 Articles and 9 Schedules there is room for constitutional conventions. The debates are clear on this, and they form an important source for ascertaining such conventional rules to supplement the written provisions in the Constitution, as, for example, upon the practical relationship between the President and the Council of Ministers. In Chapter 6 there is a fascinating comparative account of English, American and Indian constitutional laws concerning the separation of powers and delegated legislation. The English model is followed in the Indian Constitution as far as the separation of powers is concerned, but it was left to the President to seek a special Advisory Opinion from the Supreme Court upon the validity and status of delegated legislation. Both the English and United States systems influenced the judges, and it was only by a majority that the court decided in favour of the English approach to the problem, save that the Indian Parliament would be limited in delegating legislative powers by the terms of the Constitution. Yet surely it might be suggested that in any modern State delegated legislation is necessary, whatever excuse for its existence is made. Finally, there is an account of the steps whereby India, with the agreement of the United Kingdom, Canada, Australia, New Zealand, South Africa, Pakistan and Ceylon, became a Republic within the Commonwealth, a precedent later followed by Pakistan and, in a way, by Malaya, and which seems likely to be followed in the future by South Africa and Ghana. The author anticipates embarrassment for the Queen if member nations of the Commonwealth should be in international disagreement, particularly over problems of participation or non-participation in wars. But the point is probably over-stressed. The Kashmir problem first arose while India and Pakistan both owed allegiance to the Crown, and before the Monarch became merely the symbolic Head of the Commonwealth. The Commonwealth is probably of a sufficiently flexible structure to preclude any serious difficulties at least on this one score.

On the whole the reader gains the impression that the Indian Constitution is working well, and this is a tribute equally to the constitution-makers, its administrators and to the model upon which the document was based. Possibly the most important question still unanswered is whether the political stability of India will be maintained, for legal principles must always be subject to the greater power of force, if wielded. Many will hope that there will be no repetition in India of the fate which befell the Pakistan Constitution in the autumn of 1958. Professor Alexandrowicz is to be congratulated upon his contribution towards the understanding of the Constitution of the first Republic within the Commonwealth.

D. C. M. YARDLEY.

PUBLIC LAW

Autumn, 1959

COMMENT

MOST words are relatives and change their meaning in context and contrast. When we speak of a question of fact as distinct from a question of law and then of a question of fact as distinct from a question of opinion, the meaning of "fact" is not constant. A Commission may be asked to "inquire and report" or to "inquire and make recommendations." In the first case we expect, in one sense, only "facts" and not suggestions for future conduct also.

For some days before the appointment of the Devlin Commission on Nyasaland, the Opposition had been urging the Government to send out a Parliamentary delegation, but the Government thought their own proposal was more appropriate because it included those who had "judicial and expert experience and African experience." The terms of reference of the Commission were to "inquire and report" and the Secretary of State for the Colonies was certain, he said, that it would take "every appropriate step to arrive at the truth and accuracy of the facts put before it." The Report of the Commission said: "The task with which you entrusted us was to report and not to make recommendations. . . . Our construction of your warrant is, as we have said, that we are to find the facts."

Everyone seemed therefore agreed on the job to be done. And if, before the Commission had reported, the Government had been asked if they would accept the "facts" found, they would probably have said that they would. In the event the Government did not accept the whole of the Report of the Commission.

The declaration of a state of emergency in Nyasaland had been justified by the Secretary of State on the ground that the Nyasaland Government had received information which, he said, "made it clear that plans had been made by Congress to carry out widespread violence and murder of Europeans, Asians and moderate African leaders; that, in fact a massacre was being planned." What were the "facts"?

The Report of Commission said: "We have found that violent action was to be adopted as a policy, that breaches of the law were

to be committed and that attempts by the Government to enforce it were to be resisted with violence. We have found further that there was talk of beating and killing Europeans, but not of cold-blooded assassination or massacre. . . . We do not think that there is anything that can be called a plot nor, except in a very loose sense of the word, a plan." The Attorney-General found this distinction drawn by the Commission between a plot or plan of massacre and the adoption of a policy of violence, with talk of killing Europeans, "too subtle" for him. The Commission went on to say that for reasons they stated "we have rejected the evidence, such as it is, for the murder plot." They proceeded to examine the existence of another "fact," that is, "to what extent the Government's belief in the supposed existence of a murder plot affected its policy" and added: "It has not proved at all easy to ascertain to what extent the Government was convinced of its existence" but in any event "if the Government had had no information about a murder plot, we believe that they would still have declared a state of emergency on or about March 3." We have it on good authority that the state of a man's mind is as much a fact as the state of his digestion but it is not clear whether the Secretary of State expected the Commission to report on how far belief in the murder plot materially affected "the conception of government policy," as the Commission put it.

Another "fact" examined by the Commission was the role of Dr. Banda. "There are occasions in my profession," said the Attorney-General in the House of Commons, "when one argues in the Court of Appeal that the decision of a judge on a question of fact is wrong. . . . I submit to the House that the Commission's decision with regard to Dr. Banda was against the weight of the evidence which the Commission itself found."

A third example concerned certain actions committed by or on behalf of the Nyasaland Government which the Commission criticised under the headings: burning of houses; confiscation of implements; use of unnecessary force in arrests; use of force in villages. The Report stated: "The Government has not at any time, either before us or, so far as we are aware, to anyone else, expressed any regret for or disapproval of what has been done under these heads. We record this as a fact and not as indicating that any expression of regret or disapproval is necessarily appropriate; that is a matter for you. We think that for many of these actions there are thought to be sound administrative reasons. If that is so, no doubt you will be furnished with them. We do not set out such as we have heard because it would be outside our province to discuss them or

to discuss the larger question whether sound administrative reasons can justify breaches of the law." Of this Lord Coleraine (who is not, of course, a member of the Government of this country) said in the House of Lords: "The basis of my charge against the members of the Commission is that, having said that they are not going to offer judgments, they offer a moral judgment of a very damaging kind, while maintaining the fiction that they are not a judgment at all. And in my view that is intellectually dishonest."

"The purpose of Government in appointing Commissions of this kind . . . is to clarify the issues . . . but [Governments] do not pledge themselves beforehand to accept the findings. . . . To do any such thing would be to surrender the functions of Government to some outside body." So Lord Salisbury.

Through all these arguments runs the confusion. If "facts" means simply hard physical occurrences of the "A hit B" type, and these are the "findings," then there is much justification in the question: what is the use of appointing a Commission and then not accepting what it says? But if "facts" includes also A's motive in hitting B or A's deduction from other happenings that he should hit B or how far A's deduction was the primary reason for his hitting B, then the question has much less force. There may well have been a genuine failure, on the part of the Secretary of State, to make clear to the Commission exactly what they were supposed to do.

If, however, this confusion did exist and if the Secretary of State did not intend the Commission to make "factual" deductions and "factual" analyses of the states of mind of the participants, this, though it may to some extent justify the rejection of part of the Report, is open to other criticism. For surely a strong Commission, like that appointed, could not be expected, when thrown into the political whirlpool of Nyasaland, to limit itself to the findings of facts in the most restricted sense. You do not appoint an eminent High Court judge of outstanding ability and support him by men of particular experience to count the pebbles on the shore. Lord Salisbury said that in calling Nyasaland a "police state" and blaming the Nyasaland Government for it "the Commission showed themselves more judicial than impartial." To pursue the inferences in that distinction would be interesting. But it is more immediately relevant to say that if a judge is appointed to lead a Commission of inquiry it is not unnatural that he should act judicially. By "police state" the Commission meant that it was a place "where it is not safe for anyone to express approval of the policies of the Congress party, to which before March 3, 1959, the vast majority of politically-minded Africans belonged, and where it is unwise to

express any but the most restrained criticism of government policy." What, one wonders, is the "impartial" phrase for such a place?

One effect of the Report of the Devlin Commission may be that governments of every party colour may be more reluctant in future to use the "wise men" device. And on balance this would be a happy outcome. In the last resort, politicians will take political decisions. And it is generally better that they should take them in the earlier resorts also. For then they take political responsibility most obviously.

NOT RES JUDICATA

The Court of Appeal's recent decision in *Society of Medical Officers of Health v. Hope (Valuation Officer)*¹ will cause anxiety among those societies "instituted for purposes of science, literature, or the fine arts exclusively," who are currently exempted from payment of rates under the Scientific Societies Act, 1843. The effect of the decision is that a determination by a valuation court, or even by the House of Lords, that a particular society comes within that Act is only valid for the current valuation list. When, five years later, a new valuation list comes into force, and the valuation officer has chosen to assess the society for rates, the whole question is open again, although there has been no change at all in the society's constitution or activities. Despite the fact that the matter has already been determined between the same parties, it is not *res judicata*, and the society will once more have to take the issue to the courts. As Sellers L.J. said,² in his dissenting judgment, "instability and uncertainty seem to be as undesirable in rating as in any other factor affecting future planning and financing of the affairs of a trade, an organisation or an individual."

What happened in this case was that, in 1951, a society made a proposal to delete from the current valuation list a hereditament occupied by it on the ground that it was exempt from payment of rates under the Scientific Societies Act. The valuation officer objected but, on appeal to the local valuation court, the court decided that the hereditament was exempt under the Act and directed that the list be amended to accord with that decision. On April 1, 1956, a new valuation list came into force and the society's hereditament was entered on that list with gross and rateable values. The society again made a proposal that it was exempt under the 1843 Act and the valuation officer again objected. On appeal to the same valuation court, the court stated that it had, in 1951, decided that the society was exempt, and in the absence of evidence of any variation in the

¹ [1959] 2 W.L.R. 377.

² At p. 397.

society's constitution and activities since 1951, the court decided that the hereditament be exempt from rates under the Act. On the valuation officer's appeal to the Lands Tribunal, the society entered a plea of *res judicata*, but the Tribunal rejected it. On appeal to the Court of Appeal, the Court of Appeal held that the doctrine of *res judicata* was inapplicable since the issue arising on the new valuation list was a new issue which had to be resolved by a fresh investigation to ascertain whether the society was still within the Act of 1843. The only question, said Morris L.J.,³ which the court in 1951 had jurisdiction to decide was "whether an entry should be made in the valuation list in the manner set out in the proposal of the society. The local valuation court never purported to give a decision which could operate in relation to the year 1956."

On the strict meaning of the words "*res judicata*," the Court of Appeal's decision is doubtless correct—the proceedings on the 1951 proposal dealt with the appropriate entry to be made in the list then in operation, whereas the proceedings on the 1956 proposal dealt with an entry to be made in the new list. Many lawyers, however, will favour Sellers L.J.'s view that the only issue—the only *res*—that arose in the 1956 valuation list was whether or not the society was exempt as a society within the Act of 1843, and that issue had already been decided between the same parties in 1951. When the decision in 1951 was based entirely on a finding that the society did come within the Act of 1843, it is strange that Morris L.J. refers to this as an "incidental" issue of fact or law.

GORDON BORRIE.

CERTIORARI TO REMOVE CAUSES FROM INFERIOR COURTS OF CIVIL JURISDICTION AFTER JUDGMENT

In 11 Halsbury's *Laws of England* (3rd ed.) it is stated in paragraph 237 on p. 128: "A civil action cannot be removed from an inferior court by certiorari after final judgment for any other purpose than execution"; and in paragraph 239 at the top of p. 130: "Certiorari does not lie to quash the judgments of inferior courts of civil jurisdiction." It is the purpose of this article to examine the authority for these statements.

It is a well-established rule that certiorari will not lie to any court to which the old writ of error lay,¹ and this is so even though the defect complained of is one which was not within the ambit of the writ of error and is within the ambit of certiorari, e.g., defect of

³ At p. 390.

¹ 11 Halsbury, 3rd ed., 128, para. 239.

jurisdiction not appearing on the face of the proceedings.² The origin of this rule, according to a note in 69 L.Q.R. 175-177, is a statute of 1403, 4 Hen. 4, c. 23, which enacted "... after judgment given in the courts of our Lord the King, the parties shall be thereof in peace until the judgment be undone by attainr or by error, if there be error." But although this rule explains some instances where certiorari does not lie to quash the judgment of an inferior court of civil jurisdiction, it does not explain others. It explains why certiorari does not lie to quash a judgment, say, of the Liverpool Court of Passage, this being an inferior court of civil jurisdiction in which the procedure is according to the common law, so that error would have lain (why this is so will be shown later), but it does not explain why certiorari should not lie to quash a judgment, for example, of a county court. The modern county courts were at their inception,³ and are,⁴ courts of record, courts of record alone being subject to certiorari.⁵ They were also at their inception courts whose procedure was summary and out of the course of the common law.⁶ Presumably, therefore, error never lay to them during the short period between their establishment in 1846 and the abolition of the writ of error in civil matters in 1875.⁷

The authority given in Halsbury for the two statements quoted above is *Lawes v. Hutchinson*.⁸ This case, however, with respect, does not appear to be a sufficient authority for the wide terms of the proposition that "certiorari does not lie to quash the judgments of inferior courts of civil jurisdiction." In *Lawes v. Hutchinson* a rule nisi had been obtained both for a writ of habeas corpus and for a writ of certiorari, with the objects (a) of bringing before the Court of Exchequer one Hutchinson, who was the defendant in *Taylor v. Hutchinson* in the Palace Court and was in the custody of that court, and who was also the defendant in *Lawes v. Hutchinson* in the Court of Exchequer, and (b) of removing *Taylor v. Hutchinson* into the Exchequer. Final judgment in *Taylor v. Hutchinson* had been given in the Palace Court action. This same action had already once before been removed into the Exchequer and had been sent back to the Palace Court. Now, the statute 21 Jac. 1, c. 23, s. 3, provided that if any action had once been removed to any of the courts at Westminster and had subsequently been sent back, it should not again be removed before judgment. Parke B., with whom Lord Abinger C.B.

² *Ibid.*, note (d).

³ County Courts Act, 1846, s. 3.

⁴ County Courts Act, 1934, s. 1 (2).

⁵ 11 Halsbury, 3rd ed., 124, para. 230.

⁶ County Courts Act, 1846, s. 74.

⁷ Supreme Court of Judicature Act, 1875, First Sched., O. 58, r. 1.

⁸ (1835) 3 Dowl. 506.

agreed, said: "The act restricts the removal of a cause to any time before judgment; after judgment, it can only be removed by writ of error. We have no power, therefore, except for the purpose of enforcing execution under the Act, to remove the proceedings after judgment, except by certiorari with a writ of error." The meaning of the opening words of this quotation, "the act restricts the removal of a cause to any time before judgment," is not at once obvious. They clearly do not mean that the effect of the act is to prohibit any removal of a cause except before judgment. It is submitted, with respect, that what Parke B. meant by these words was that the prohibition of a second removal imposed by the Act applied only until judgment, which, since final judgment in the cause had been given, was the answer to counsel's contention that "this cause, therefore, having been once remanded to the inferior court, cannot be removed again." Parke B. then goes on to indicate that after judgment the cause can be removed, not however by certiorari, but by writ of error.

Now, the Palace Court was an inferior court of record created by James I having jurisdiction over all personal actions arising within twelve miles of Whitehall, and its procedure was according to the common law. It was, therefore, a court to which error lay. It is submitted, therefore, that *Lawes v. Hutchinson* merely confirms the rule that the writ of error was the proper method of removing a cause after judgment from an inferior court of record in which the procedure was according to the common law. The object of seeking a writ of certiorari in *Lawes v. Hutchinson* was not to challenge the judgment of the Palace Court, but only, it would appear, to facilitate the production of Hutchinson by his bail in the Court of Exchequer. Nevertheless, the proper method of removing a cause, for whatever purpose, from such a court after judgment was by writ of error.

A further authority is cited in Halsbury,⁹ together with *Lawes v. Hutchinson*, namely, *Kemp v. Balne*,¹⁰ and in the judgment in *Kemp v. Balne* the case of *Walker v. Gann*¹¹ is referred to. It is submitted that the same remarks apply to these two cases as to *Lawes v. Hutchinson*. The procedure of the Court for the Forest of Knareborough, in which *Walker v. Gann* was tried, appears to have been according to the common law. A declaration was filed, whereupon the defendant let judgment go by default; a writ of inquiry was then executed, and a verdict found for the plaintiff. As regards the Borough Court of Record of Poole, in which *Kemp v. Balne* was heard, Halsbury states: "The practice and procedure is analogous to that of the superior courts of common law before 1852." In both

⁹ 11 Halsbury, 3rd ed., 130, n. (g).

¹⁰ (1844) 1 Dow. & L. 885.

¹¹ (1826) 7 Dow. & Ry. 769.

cases, therefore, there could be no question of certiorari after judgment.

Apart from inferior courts of record of civil jurisdiction whose procedure was according to the common law and to which certiorari did not lie after judgment because error lay, there were other inferior courts of record of civil jurisdiction to which certiorari did not lie because they exercised a jurisdiction which the courts at Westminster could not exercise, e.g., ecclesiastical courts: see *R. v. Chancellor of St. Edmundsbury and Ipswich Diocese*,¹² where Wrottesley L.J. said: ". . . the King's Bench was bound to refuse it [certiorari to quash] for the reason that it would remove into the King's Bench proceedings not capable of being determined there." Analogous to this refusal was the rejection by the Court of Common Pleas in *Scott v. Bye*¹³ of a writ of false judgment (the appropriate writ to quash the judgment of a court not of record) issued to the Southwark Court of Requests, on the ground that courts of requests being courts of equity or conscience "it would, therefore, be absurd to remove a judgment of that court here, as we can only decide on the principles of common law."

Finally, there were inferior courts of record of civil jurisdiction to which error never lay, because their procedure (but not the law administered) was summary and out of the course of the common law, and yet to which, according to the proposition laid down by Halsbury, certiorari to quash did not lie either. It is the authority or lack of authority for this limb of the proposition, which is not covered by *Lawes v. Hutchinson*, which requires to be elucidated.

The distinction between courts whose procedure was, and courts whose procedure was not, according to the common law was well established. In Tidd's *Practice*¹⁴ we find: "And it is said, that whenever a new jurisdiction is erected by Act of Parliament, and the court or judge that exercise this jurisdiction, act as a court or judge of record, according to the course of the common law, a writ of error lies on their judgments; but when they act in a summary way, or in a new course different from the common law, there a writ of error lies not, but a certiorari." In *Groenvelt v. Burwell*,¹⁵ which was an action by a physician against the Censors of the College of Physicians, who had fined and imprisoned the plaintiff for "mala praxis," it was held that no action lay against the Censors for what they had done

¹² [1948] 1 K.B. 195, C.A., at 214. This quotation gives only one of the reasons why the Court of Appeal upheld the Divisional Court's refusal to grant an order of certiorari. The Court of Appeal laid stress also on the absence of any precedent, and Wrottesley L.J. doubted whether ecclesiastical courts were "inferior courts" in the sense required for the issue of an order of certiorari.

¹³ (1824) 9 Moore's Reports 649, 660.

¹⁴ 2 Tidd, 8th ed., 1188.

¹⁵ (1699) 1 Ld. Raym. 454, 468-469.

in their capacity as judges, but that their judgment was subject to removal by certiorari. The relevant part of the report reads as follows: "*Objection.* That the party has no remedy, neither by writ of error, nor otherwise. *Answer.* That he hath a remedy as good as a writ of error. . . . He [Lord Holt C.J.] agreed that the plaintiff cannot have a writ of error, because it is a court newly instituted, impowered to proceed by methods unknown to the common law; as there is no need to have an indictment, or such formal judgment, as in other cases; as there is no need to say 'ideo consideratum' etc., but only 'quod solvat.' He compared it to convictions before justices out of sessions, upon which error lies not, yet a certiorari lies; for it is a consequence of all jurisdictions, to have their proceedings returned here by certiorari, to be examined here."

It is true (a) that *Groenvelt v. Burwell* dealt with a criminal conviction, not a civil judgment, and (b) that the Censors of the College of Physicians would not, perhaps, be considered as a court in the usual sense of that word. As regards the first point, there seems to be no reason for limiting the supervisory jurisdiction exercised by means of certiorari to criminal matters. In *R. v. Northumberland Compensation Appeal Tribunal*¹⁶ Singleton L.J. said: "Error on the face of the proceedings has always been recognised as one of the grounds for the issue of an order of certiorari. I can find no authority for saying that in this respect there is any distinction to be drawn between proceedings of a criminal nature and civil proceedings. *Parish of Ricelip v. Parish of Henden*¹⁷ was a settlement case." As to the second point, Scrutton L.J., in *R. v. London County Council, ex p. Entertainments Protection Association, Ltd.*,¹⁸ said: "The writ of certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior court. There has been a great deal of discussion and a large number of cases extending the meaning of 'court.' It is not necessary that it should be a court in the sense in which this court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a court; if it

¹⁶ [1952] 1 K.B. 338, C.A., at 341.

¹⁷ (1698) 5 Mod. 416.

¹⁸ [1931] 2 K.B. 215, 233.

is a tribunal which has to decide after hearing evidence and opposition, it is amenable to the writ of certiorari."

It is submitted, on the authority of the cases cited, that, apart from statutory restrictions, certiorari does lie to quash the judgments of inferior courts of record of civil jurisdiction whose procedure is summary, and in particular lies, subject to statutory restrictions, to quash the judgment of a county court. Removal of the judgment of a county court by certiorari is, indeed, prohibited by section 104 of the County Courts Act, 1894, but such prohibition has been held not to prevent removal for defect of jurisdiction in the court which gave the judgment or fraud in the party who obtained it.¹⁹ There does not appear to be any case in which the judgment of a county court has been quashed for either of these reasons, but in *R. v. Lloyd*²⁰ an application to quash the judgment of a county court for lack of jurisdiction, on the ground that the trial was held before a deputy who had been improperly appointed by the judge, was entertained without objection.

The absence of any case where a county court judgment has been quashed on certiorari constitutes no very weighty argument against the proposition here contended for. The ancient writ of certiorari, as can be seen from the case of *R. v. Northumberland Compensation Appeal Tribunal*,²¹ although its operation is sometimes restricted by statute, still retains its vigour, and can act effectively where the common law principles of this remedy have scope to operate. In *R. v. Nat Bell Liquors, Ltd.*,²² Lord Sumner, speaking of the supervisory jurisdiction which is exercised by means of certiorari, said: "That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise." In *R. v. Northumberland Compensation Appeal Tribunal*, where the decision of that Tribunal awarding compensation to an ex-employee of a hospital board was challenged by the ex-employee as being erroneous in law, an order of certiorari to bring up and quash the decision was upheld on appeal. The contention that the scope of certiorari had contracted in the course of time and that it was now limited to supervising the jurisdiction of inferior courts and was no longer concerned with the legality of their decisions, was rejected. What had been said as long ago as 1699 in *Parish of Ricelip v. Parish of Henden* was reaffirmed, namely, that where an inferior tribunal gives reasons for its decision from which it appears that it has erred in law, its decision can be

¹⁹ *The Colonial Bank of Australasia v. Willan* (1874) L.R. 5 P.C. 417, 442.

²⁰ [1906] 1 K.B. 22 and 1 K.B. 552, C.A.

²¹ [1951] 1 K.B. 711 and [1952] 1 K.B. 338, C.A.

²² [1922] 2 A.C. 128, 156.

removed by certiorari and quashed. *R. v. Northumberland Compensation Appeal Tribunal* affirmed the continuing availability of certiorari for the purposes for which it was formerly available, and it is submitted that there is no authority for saying that it does not lie to any court to which error never lay.

Reference must be made to what, it is submitted, is an error in law in the County Courts Acts of 1846 and 1850. Section 108 of the former provided that "no judgment . . . shall be . . . removed upon or by any writ of error, or supersedeas thereon," and section 16 of the latter that "no judgment . . . shall be removed by . . . writ of error, certiorari or otherwise." If the argument in this article is valid, then it would follow that the writ of error never could have lain to the county courts established in 1846. The proper writ for removing judgments after 1846 was certiorari; prior to 1846 it was the writ of false judgment,²³ since the old county courts were not courts of record.

The reason for what, it is submitted, with respect, is the unduly wide rule laid down in Halsbury, which is the subject of this article is, perhaps, partly a failure to distinguish between courts whose procedure was formal and according to the common law and those courts whose procedure was summary. But apart from this, it is submitted that a statute of Henry V, which considerably limited the availability of certiorari after judgment, continued to exert an influence even after the reasons for its enactment no longer existed. In Tidd's *Practice*²⁴ it is stated: "After judgment a certiorari does not generally lie, to remove a cause from an inferior court; and therefore if it be returned thereon, that the defendant is condemned by judgment, he shall be remanded, and continue in prison, until agreement be made with him of the sum adjudged." The authority cited for this is 2 Hen. 5, st. I, c. 2. This statute recited the way in which imprisoned judgment debtors had been accustomed to obtain their release on bail by means of writs of certiorari or corpus cum causa, and in order to protect the rights of successful plaintiffs the statute enacted that if it was returned on the writ that the prisoner was a judgment debtor, then he should be at once remanded and should remain in prison until he had come to some agreement with the judgment creditor.

In the result, it is submitted that the two paragraphs from Halsbury cited at the beginning of this article are not, in their present form, fully supported by authority, and that the correct legal position, omitting reference to any courts excluded from certiorari as administering a peculiar system of law, might be set out as follows:

²³ 1 Holdsworth 74.

²⁴ 1 Tidd, 8th ed., 40.

paragraph 237: "A civil action cannot after judgment be removed by certiorari from an inferior court to which the writ of error formerly lay, but can, subject to the effect of any statutory restrictions, be removed by certiorari after judgment from any other inferior court of record of civil jurisdiction"; paragraph 239: "Certiorari does not lie to quash the judgments of inferior courts of civil jurisdiction to which the writ of error formerly lay, but does lie, subject to the effect of any statutory restrictions, to quash the judgment of any other inferior court of record of civil jurisdiction."

PERCY C. HUBBARD.

FLOUTING A STATUTE

In the recent case of *Att.-Gen. v. Harris*,¹ Salmon J. refused to grant an injunction to restrain the defendants from selling flowers from two stalls which projected onto a footway. The defendants had been convicted and fined a number of times under the Manchester Police Regulation Act, 1844, but they continued to operate the stalls. The main reason for the decision was that, although the defendants had contravened a statute, the defendants' acts had not caused more than trivial injury to the public.

Undoubtedly, it seems now to be well settled that, although the Attorney-General always has a complete discretion whether or not to bring an action to restrain a breach of statute either *ex proprio motu* or at the relation of an individual or public authority,² the court still has an independent discretion to decide whether an injunction ought to be granted.³

The question is whether a court ought to refuse an injunction sought by the Attorney-General, when there has been an undoubted breach of statute, simply because the degree of public injury is, in the court's view, slight. Salmon J. agreed that if the acts of the defendants obviously tended to injure the public, and the Attorney-General decided that an injunction was the only appropriate remedy, the court would follow the Attorney-General's view, and grant the injunction he sought. But the Court of Appeal's decision in *Att.-Gen. v. Westminster Corporation*,⁴ apparently not cited to the court in *Harris's* case or referred to by the judge, goes much further than this. Warrington L.J. said that if the Attorney-General comes to the

¹ [1959] 2 All E.R. 393.

² See *L. C. C. v. Att.-Gen.* [1902] A.C. 165.

³ As Farwell L.J. said in *Att.-Gen. v. Birmingham, Tame and Rea District Drainage Board* [1910] 1 Ch. 48, 61, "it is for the Attorney-General to determine whether he should commence litigation, but it is for the court to determine what the result of that litigation shall be."

⁴ [1924] 2 Ch. 416.

conclusion that he is justified in asking the court to restrain an illegal act, the court ought not to refuse it merely because there is no evidence of any public wrong being done. In the earlier case of *Att.-Gen. v. Cockermouth Local Board*,⁵ Jessel M.R. pointed out that when the Attorney-General asks for an injunction, "it is not necessary for the Attorney-General to show any injury at all. The legislature is of opinion that certain acts will produce injury and that is enough."

Salmon J., discussing the earlier cases, says that in all cases where the court has granted an injunction to the Attorney-General, the actions complained of did, in their nature, tend to the public injury. But several cases also suggested that any breach of statute does, of itself, tend to the public injury. Hence the emphasis in *Att.-Gen. v. Cockermouth Local Board*, and later in *Att.-Gen. v. Wimbledon House Estate Co., Ltd.*,⁶ that there was no need to prove positive public injury. Farwell J. in the latter case put it this way:

"The Attorney-General has brought to the attention of the court the fact that there has been a clear and deliberate breach of duty imposed by a public statute, and in my opinion the mandatory injunction follows as a matter of course."

The argument is stronger when, in *Att.-Gen. v. Harris* as in several of the older cases, criminal sanctions have proved inadequate. In *Att.-Gen. v. Sharp*,⁷ not referred to in *Harris's* case, though also concerned with the Manchester Police Regulation Act, 1844, statutory remedies employed against people running buses without a licence had proved of no avail; repeated fines had not discouraged the defendants from continuing to run the buses. The Court of Appeal held that, although there were remedies provided by the statute, that did not prevent the Attorney-General seeking an injunction to enforce public rights. Lawrence L.J. made the point that if no injunction were granted, the defendants would continue to flout the statute—it would continue to be a "permanent habit." The same could be said of *Att.-Gen. v. Harris*. Lord Goddard C.J., in *Att.-Gen. v. Smith*,⁸ had to deal with a case where the defendant had used land as a caravan site without planning permission and used to his advantage the slow enforcement machinery of the Town and Country Planning Act to act in defiance of the Act for as long as possible. Lord Goddard said:

⁵ (1874) L.R. 18 Eq. 172, 178.

⁶ [1904] 1 Ch. 34, 44.

⁷ [1931] 1 Ch. 121.

⁸ [1958] 2 Q.B. 173, 186.

"If a defendant shows by his conduct that he intends to avoid the Act and act in breach of it so far as he can and for as long as he can, then the Attorney-General is entitled to an injunction . . ."

If the Attorney-General feels that an injunction is the only way to gain observance of a statute, it does not appear from these cases that the court ought to go into the question of whether or not the actual injury to the public is slight. Naturally, if there is no indication that the defendant would repeat his offence, the court would justifiably refuse an injunction. The threat of the action may be sufficient, but if it is not, the guiding principle ought to be that the public have an interest in seeing that Acts of Parliament are obeyed, and if, in spite of criminal sanctions, people continue to defy the Act, the Attorney-General ought to be entitled to come to court to get an injunction as a matter of course. Uthwatt J. put the point concisely in *Att.-Gen. v. Ripon Cathedral*⁹ when he said that in considering whether an injunction ought to be granted, it is irrelevant that there is no evidence of public injury, for the law is to be obeyed whatever be the wishes of those affected by it and it is not for the court to dispense with its observance.

Can it be argued that, if the public injury is trivial, the court ought to decline an injunction and give simply a declaration? Dr. de Smith in his recent book, *Judicial Review of Administrative Action*,¹⁰ says that in a case like *Att.-Gen. v. Westminster Corporation*,¹¹ although the Court of Appeal refused to decline an injunction against a public authority simply because the excess of statutory powers was minor, it would at least be open to the court to award a declaration instead. A public authority may be assumed to obey a declaration, but if the defendants are private individuals who have shown every intention to continue to disobey a statute, a declaration without, at any rate, being coupled with leave to apply for an injunction, might be quite ineffective.

If the Attorney-General feels that an injunction is the only way to uphold public rights and enforce a statute, it has been urged that he ought generally to be granted one. Would that involve a plethora of actions on trivial matters? In *Att.-Gen. v. Bastow*,¹² the defendant had thrice been convicted and fined for using land as a caravan site without planning permission. A statute had been flouted and public rights infringed—the Town and Country Planning Act conferred on the public the right not to have land used in ways

⁹ [1945] 1 Ch. 239, 251.

¹⁰ (1959) at p. 346, n. 33.

¹¹ [1924] 2 Ch. 416.

¹² [1957] 1 Q.B. 514.

which may be considered to be prejudicial to the amenities of the district. Devlin J. said that, if upon every occasion that an offence were committed which involved the invasion of a public right, and which is normally dealt with by a magistrates' court by the imposition of a small fine, the Attorney-General were to take the matter up and ask for an injunction, the work of the court would become impossible, but it is for the Attorney-General to decide what cases he considers it right to deal with in this way. The court has a discretion whether to grant the injunction sought by the Attorney-General, but as Devlin J. said, the court has to bear in mind that the Attorney-General is the person who is primarily responsible for the enforcement of the law, and if he considers it necessary to seek the assistance of the court to enforce obedience to a clear provision of the law, the court ought to be very slow to say he ought to have exhausted other remedies. Could it have been argued that using land as a caravan site without planning permission did not really incommode the public at all? Surely not; there was a breach of a public right, and that was enough. So too, in *Harris's* case, there was a breach of a public right, and whether that caused actual positive public injury was irrelevant.

GORDON BORRIE.

AUSTRALIAN CASENOTE

Copyright Owners Reproduction Soc., Ltd. v. E. M. I. (Aust.) Pty., Ltd., 1959 Argus L.R. 127 is one of the very few cases in which a court has had occasion to mention the operation of section 4 of the *Statute of Westminster*. The case concerns a complex problem of the interrelation between "Imperial" and "Dominion" statutes. It also has a dissenting opinion from Douglas Menzies J., appointed in 1958, suggesting that the High Court has acquired another powerful judicial mind.

The Commonwealth of Australia is a party to the Universal Copyright Convention of 1952, but has not yet legislated so as to ratify that convention; a committee appointed by the Attorney-General's department is at present taking evidence before recommending the form of such legislation. Australia accordingly remains under the régime of the United Kingdom Copyright Act, 1911, which was brought into operation in Australia (as Imperial, not merely local, law) by the Commonwealth Copyright Act, 1912. The Commonwealth did not then make any special provision (as it could have done) for the questions concerning gramophone records covered by section 19 of the 1911 Act, and accordingly section 19 (3) established in Australia as in England a royalty rate of 5 per cent.

for the "compulsory licence" under section 19 (2). In 1928, the United Kingdom Board of Trade set up a Committee to hold an inquiry under section 19 (3) of the 1911 Act, and this Committee recommended *inter alia* an increase in the "compulsory licence" royalty of $1\frac{1}{4}$ per cent. The United Kingdom Parliament then passed an amending Copyright Act which besides confirming this increase (as required in terms by section 19 (3) of the 1911 Act) carried out some other amendments recommended by the Committee but not contemplated by the Board of Trade inquiry procedure established in the latter Act. The view taken by all concerned in 1928 was that this increase in the section 19 (3) royalty applied only in the United Kingdom and colonies, and in particular that it did not apply in Australia. Now, thirty years later, the plaintiff in the instant case challenged that view and claimed royalty at the higher rate. Its claim was rejected by the Supreme Court of New South Wales and it appealed to the High Court of Australia.

In the High Court, Dixon C.J., McTiernan and Taylor JJ., concurred in dismissing the appeal and reaffirming the 1928 view that the Australian royalty rate remained at 5 per cent. Menzies J. dissented, and this note suggests that the dissent is more convincing than the majority opinions. If the appellant's advisers think likewise, the case may reach the Privy Council; there would appear to be no question *inter se* involved.

All the court agreed that section 4 of the *Statute of Westminster* produced the result that a United Kingdom Act not reciting the request or consent of the Australian Government could have no operation in Australia. This point arose because in 1956—after the *Statute of Westminster*—the United Kingdom Parliament repealed the Act of 1911, and a question arose as to the possible effect of this on the Australian Act of 1912. It was held that the 1956 Act could not have operated in Australia in any event; Menzies J. said that in face of *Westminster*, so to treat it would attribute an "impossible intention" to the Imperial Parliament. Actually the 1956 Act (in Sched. 7, cl. 41) expressly provides that the repeal of the 1911 Act shall not operate as to other countries (such as Australia) where it has the force of law. Dixon C.J. doubted whether even this provision could be given effect *as such* in Australia, in face of section 4 of *Westminster*; it is suggested with respect that this is an excessively formal view. The substantial purpose of *Westminster* is to ensure no change in Dominion law by the United Kingdom Act, and since this can occur just as much by the *repeal* of a United Kingdom Act previously applying in a Dominion, it would seem proper for the United Kingdom Parliament to keep statutes on foot pending repeal

in a Dominion to which they apply; the result is untidy from the point of view of a Kelsenian formalism, but it works.

However, even as to the 1928 United Kingdom Act—*before Westminster*—the whole court also recognised that there was a convention, almost as powerful as *Westminster*, preventing the operation of United Kingdom Acts in the Dominions unless suitably expressed. Dixon C.J. said: “Every presumption of construction was against such an intention. Further, the concurrence of the Dominion was treated as an indispensable condition.” Every bit of factual evidence suggested that the subjective intention of the Board of Trade and the United Kingdom Parliament in 1928 was to affect the royalty situation only in the United Kingdom, and it was on the *intention* so proved, combined with the *presumption* of non-interference with Dominion law, that Dixon C.J. and McTiernan J. relied.

Taylor J. may probably be taken as agreeing with Dixon C.J., but he relied more on a different point, namely that the 1928 Act was in effect not an execution of the authority to vary the section 19 (3) royalty created by that section, but an independent amendment of the 1911 Act, because of the matters other than the royalty rate dealt with in the Act and the form in which the confirmation of the Board of Trade recommendation was expressed. It is suggested with respect that Menzies J. supplied the answer to this further point. The fact that the 1928 Act went beyond the confirmation of a Provisional Order in no way detracted from its quality as an Act confirming such an order; if it had not been as to part such a confirmation it should not have been treated as a private Bill and published as a private Act. However, this part of the discussion, like the emphasis on the probable subjective intention of the Board of Trade and the United Kingdom Parliament in the opinion of Dixon C.J., illustrates how impossible it is to solve problems of this sort on the extreme objective view of parliamentary intention often set forth in English and Australian judgments. If the question were—which kind of authority did the United Kingdom Parliament exercise?—then it cannot be answered from the words of the Act, and has to be answered by extrinsic evidence which makes sense only if regarded as evidence of what the Board of Trade and legislature collectively *had in mind*. However, it is suggested that in this case the question was misleading.

Menzies J. did not deny any of the elements of rule or presumption against the operation of United Kingdom Acts in Australia, and he was willing to assume that the Board of Trade in 1928 did not “intend” to set in motion an amendment of anything but United Kingdom law. But he took his stance on the position created by

the *adoption* of an Imperial Act *as such* by a Dominion. Clearly once this situation occurs, the presumptions about extension of United Kingdom Acts become simply irrelevant, because the Dominion—having full control over the situation and the ability to change it at any time—has here chosen for its own convenience to subject itself to the operation of Imperial law in the terms prescribed by that law itself. Here, those terms included the possibility of amendment of the law by a procedure carried out in the United Kingdom, just as on another matter (and with much less justification in common sense)—compulsory licences after the death of an author under section 4 of the Imperial Act—Australia inflicted on its citizens the necessity of applying to the Privy Council instead of establishing an Australian tribunal. The United Kingdom Act of 1911 and the Australian Act of 1912 could each have made provision limiting the authority of the Board of Trade under section 19 of the United Kingdom Act, or giving the Board an option as to the kind of authority it should exercise, but neither did any such thing. Hence there was only one authority the Board could exercise—to vary the royalty rate, and the new rate then became effective for all purposes of application of the 1911 Act. As Menzies J. pointed out, by adopting section 19 of the 1911 Act, Australia also adopted a royalty rate then uniform for a large part of the Commonwealth, and could be taken as adopting a policy favouring a uniform rate, including its continuation by adoption of variations originating in the United Kingdom. I may with respect supplement his Honour's reasoning by pointing out that having regard to the predominantly imported character of both music and gramophone records in 1912, it was sensible to leave section 19 questions in the hands of a United Kingdom authority, and this position had not changed so much in 1928 as to make any other policy then necessary.

This reasoning suggests that generally if a member of the Commonwealth chooses to continue the operation of a United Kingdom law as such, and the United Kingdom law either contains or refers to United Kingdom administrative procedures, the Commonwealth member should be regarded as adopting those procedures. This also solves another puzzle referred to by Dixon C.J., namely whether the committee inquiry of the Board of Trade, which was authorised not directly by section 19 (3) but by the operation of the Board of Trade Arbitration Act of 1874 on section 19 (3), was a procedure adopted by Australia. It is suggested that as to all United Kingdom Acts in existence when the adoption of a United Kingdom law occurs, even though not expressed to apply in the Dominion or expressly adopted by it, affecting the structure of

relevant instrumentalities, there must be an implied adoption by the Dominion. After all, the Board of Trade itself was not created by the Copyright Act, 1911, and there is no more difficulty in incorporating a procedural Act like that of 1874 than there is in incorporating the Board itself. But further I would suggest that so long as one can sensibly speak of the body in question as still existing, even subsequent alterations in its structure should be taken to be adopted as well. The member nations of the Commonwealth are fully informed about the content of United Kingdom legislation and can take appropriate steps if they dislike the nature of a relevant amendment.

Dixon C.J. and McTiernan J. seemed to regard the position of Menzies J. as depending on a view that the United Kingdom Order and Act of 1928 had to be regarded as something like *factual* conditions subsequent. It is suggested with respect that that is a complete misconception, and indeed involves treating the 1912 Australian Act as an independent enactment, not as a mere adoption of Imperial law. Once Australia had chosen to submit itself to the Imperial régime, then it submitted itself also to the procedure under section 19 (3), and the question was simply whether the authorities there mentioned had exercised the only legal authority committed to them.

GEOFFREY SAWER.

As a result of the new terms of employment recently negotiated by the printing industry, our costs of production have increased by not less than $7\frac{1}{2}$ per cent.

With great regret, therefore, we are compelled to increase the subscription for 1960 to £2 10s.

THE FRENCH CONSTITUTION OF OCTOBER 4TH, 1958

A NEW TRANSLATION AND A COMMENTARY

WILLIAM PICKLES

IN all normal circumstances the text of a paper Constitution makes the worst possible starting-point for a study of the working of any political régime. Even on the day on which a Constitution has come fresh from the press, the nation to which it belongs continues to behave in most political matters in accordance with rules or customs which antedate it, sometimes by many generations, and the new rules begin to be interpreted, modified, supplemented and sometimes ignored from the moment they come into operation. No paper Constitution therefore ever lays down more than a part of the rules governing political behaviour. But its newness and the inevitable doubts about the meaning of some parts of it give it a special interest and importance in its early years. This is especially true of the Constitution of the Fifth Republic. Some of its authors believe in its virtues with almost religious fervour and many of those who are more sceptical of its ability to cure all the political ills they have lately been heir to are none the less anxious both to give it a fair trial and to pay it the respect which its admirers think it deserves. It is invoked and argued about every day and will continue to be invoked regularly until, if it survives long enough, it becomes absorbed into the political landscape which by then it will have helped to re-form. By that time there will be no justification for any study of its text, but until then, fairly frequent references to its text and some knowledge of its meaning are bound to be necessary to those who deal with such things. That is the justification for the form of this article and its appearance at this time.

The effective Constitution of France consists of four separate elements. Of these, the first is the document of ninety-two Articles (of which eighty-seven are now valid, the last three and Articles 76 and 79 dealing only with transitional arrangements), accepted by referendum on September 28, 1958, promulgated on October 4, and known officially as "the Constitution of October 4, 1958." The second is the series of nineteen "organic laws" (most of them subsequently corrected, modified and supplemented by ordinances often also called

* The author is Senior Lecturer in Political Science in the University of London.

"organic laws") for which the document of October 4 specifically provided, and the decrees issued by virtue of powers conferred by these laws. The third is the immense volume of constitutional convention built up over 170 years and still effective, despite General de Gaulle's reputed assertion that "I have no predecessors"—the sediment deposited by the thirty or so régimes which have succeeded each other since 1791. And the fourth is the already considerable volume of interpretative precedent belonging specifically to the Fifth Republic. This article discusses only the first, second and fourth of these elements. The third is almost entirely omitted, partly because the advent of every new régime creates doubt for a time as to how much of the previously accepted unwritten Constitution will continue to be accepted, but mainly because the subject is too vast for treatment as part of a single article. In its place, there is some brief discussion of possible future interpretation and evolution. A fifth element will be added when the Constitutional Council begins to build up its own case-law.¹

At the present stage, the most important element is the October 4 text itself. This document, however, leaves much to be desired. It is obscure and ill-ordered; Professor Capitant's description of it as "the worst drafted Constitution in French history"² is no exaggeration. Doubts as to the meaning of several of its Articles have already created difficulties,³ and many more will certainly follow. It therefore seemed desirable to offer a complete text in translation. At the present moment, four translations are available in this country. The most accurate, a roneo'd document issued from Nuffield College, has minor errors, but for the rest is so literally faithful as to be at points even more obscure than the original, and is in any case not widely available. Another version, circulated by the French Embassy, is something of a caricature. A version produced by Keesing's *Contemporary Archives*⁴ is much better, but unfortunately also contains a number of errors, while the fourth version, on sale in bookshops, still contains errors of translation and boldly resolved ambiguities even in a much improved second edition. All four appeared before the publication of the organic laws, which supplement the text of the Constitution. The version offered here is a more leisured product, but the precise degree of imprecision achieved (sometimes deliberately) by the French authors and the exact shade of meaning of some of the

¹ See below, pp. 245, n. 58, 246, n. 63, 249, n. 80, 259–260.

² Preface to L. Hamon, *De Gaulle dans la République*, p. xiv. See also the acid comments of Professors Morhange, L'Huillier (*Recueil Dalloz Hebdomadaire*, Jan. 21, 1959, and July 8, 1959), and Durand (*Jurisclasser*, Feb. 4, 1959).

³ e.g., on the meaning of Art. 49 (i) when the first Government of the Fifth Republic met its first Parliament, and on that of Arts. 34 and 40 when the drafting of rules of procedure began. ⁴ December 6–13, 1958, pp. 16529 *et seq.*

more precise parts are not always capable of translation, nor can the products of the ingenuity of French public lawyers be forecast.⁵

Most translations of French legal terms, for which there is often no precise English equivalent, are only very rough approximations. In these cases, the French term is given in a footnote. Footnotes have been used also for references, translation problems, purely textual commentary, and summaries of organic laws. The text of the Constitution, which follows, is given in sections, to facilitate comment.

PREAMBLE

The French people solemnly proclaim their attachment to the Rights of man and to the principles of national sovereignty⁶ as defined by the Declaration of 1789, confirmed and completed by the Preamble to the Constitution of 1946.

By virtue of these principles and of that of the free determination of peoples, the Republic⁷ offers to those Overseas territories which express a desire to accept membership of them new institutions founded on the common ideal of liberty, equality and fraternity and conceived with a view to their democratic evolution.⁸

Article 1. The Republic and those peoples of the Overseas territories who, by an act of free determination, adopt the present Constitution set up a Community.

The Community is founded upon the equality and solidarity of the peoples composing it.

TITLE I

Sovereignty

Article 2. France is an indivisible, secular, democratic and social Republic.⁹ It ensures the equality before the law of all citizens, without distinction of origin, race or religion. It respects all beliefs.

The national emblem is the tricolour flag, blue, white and red.

⁵ The Constitution was published in the *Journal Officiel* of Oct. 5, 1958. The most convenient French text is in *Brochure No. 1119* (1959) of the *Imprimerie des Journaux Officiels*, which also gives the organic laws and certain other useful ordinances. For the benefit of readers who do not have access to this, references to organic laws in the present article quote the number of the law and the date of its publication in the *Journal Officiel*.

⁶ Meaning, presumably, the principle that sovereignty belongs to the whole nation, as stated in Art. 3 (in each case) of the Declaration of the Rights of Man and of the Constitutions of the Fourth and Fifth Republics.

⁷ As under the previous Constitution, "the Republic" consists of France together with her Overseas Territories and *départements*. The term is used here, however, to distinguish between metropolitan France (including Corsica and the Overseas *départements*) and the former Overseas Territories.

⁸ The "Community" to which this paragraph refers is discussed along with the text of Title XII.

⁹ "Social Republic" is not a happy expression in English. In France "*république sociale*" goes back at least to 1848. The adjective means "recognising that the State has social as well as legal and political obligations." Note also that the word "Republic" is heavily charged with emotional overtones implying, among other things, a great ideal of what is conveyed in English by "democracy." Its use in the Constitution of the Fifth Republic is as deliberate and as significant as was its omission from the title of the Vichy régime.

The national anthem is the "*Marseillaise*."

The motto of the Republic is "Liberty, Equality, Fraternity."

Its principle is government of the people, by the people, for the people.

Article 3. National sovereignty belongs to the people, who exercise it through their representatives and by way of referendum.

No section of the people and no individual may claim to exercise it.

The suffrage may be direct or indirect in conditions provided for by the Constitution. It is in all cases universal, equal and secret. The right to vote, in conditions laid down by law, is enjoyed by all French nationals of either sex who are of age and in full possession of their civil and political rights.

Article 4. Parties and political groups play a part in the exercise of the right to vote. The right to form parties and their freedom of action are unrestricted. They must respect the principles of national sovereignty and of democracy.

Much of the above is taken from the text of the Constitution of the Fourth Republic—and indeed of earlier régimes. Two changes are important. Under the Fourth Republic, the French people exercised their sovereignty, in matters other than constitutional, "through their representatives in the National Assembly." The omission of the last four words from the appropriate article of the new Constitution leaves the exercise of sovereignty divided between the Assembly, the Senate, and the President of the Republic, the latter being equally a "representative" of the people. Article 4 is in part a reply to those who suspected General de Gaulle of opposition to the party system, but its third sentence is a concession to those who wished to secure constitutional authority for a possible banning of the Communist Party. In practice, however, with a little ingenuity in redrafting its own statutes, and with the aid of a liberal spirit in the Constitutional Council or the *Conseil d'Etat*,¹⁰ the Communist Party might use this article as a protection against a law intended to ban it.

TITLE II

The President of the Republic

Article 5. The President of the Republic endeavours to ensure respect for the Constitution. He provides, by his arbitration, for the regular functioning of the public authorities¹¹ and the continuity of the State.¹²

¹⁰ See below, p. 245, n. 58.

¹¹ "*les pouvoirs publics*," a common expression in French constitutional and related texts, but having no equally current equivalent in English. It covers organs of legislation and government, but not the administration (including local government) or the judiciary.

¹² "*la continuité de l'Etat*," a favourite expression of General de Gaulle's expressing something equivalent to the notion that "the Queen's government must be carried on."

He is the protector of the independence of the nation, of the integrity of its territory, of respect for treaties and Community agreements.

Article 6. The President of the Republic is elected for seven years by an electoral college which includes the members of Parliament, of the Departmental Councils,¹³ and of the Assemblies of Overseas territories, in addition to the elected representatives of the Municipal Councils.

These representatives are:

- the Mayor for *communes* of less than 1,000 inhabitants;
- the Mayor and first Deputy-Mayor¹⁴ for *communes* of 1,000 to 2,000 inhabitants;
- the Mayor, first Deputy-Mayor and the municipal Councillor having received the highest vote in the municipal elections, for *communes* of 2,001 to 2,500 inhabitants;
- the Mayor and first two Deputy-Mayors for *communes* of 2,501 to 3,000 inhabitants;
- the Mayor, the first two Deputy-Mayors and the three municipal Councillors having received the highest votes, for *communes* of 3,001 to 6,000 inhabitants;
- the Mayor, the first two Deputy-Mayors and the six Councillors having received the highest votes, for *communes* of 6,001 to 9,000 inhabitants;
- all the municipal Councillors for *communes* of more than 9,000 inhabitants;
- in addition, for *communes* of more than 30,000 inhabitants, delegates nominated by the Municipal Council at the rate of one for every thousand inhabitants after the first 30,000.

In the Overseas territories of the Republic,¹⁵ the electoral college also includes representatives elected by the Councils of the administrative entities,¹⁶ in the conditions laid down in an organic law.¹⁷

¹³ "*conseils généraux*," the elected bodies administering the geographical *départements*.

¹⁴ "*premier adjoint*," the Councillor chosen (or one of two or more so chosen) to assist the Mayor in his functions as administrator of the *commune*. The *commune* is the basic unit of local government.

¹⁵ *i.e.*, such of the former Overseas Territories as did not either vote in majority against the draft Constitution at the referendum of Sept. 28, 1958, or exercise the right conferred by Art. 76 to become either Overseas *départements* or member States of the Community.

¹⁶ "*collectivités administratives*," a term without precise English equivalent, used since the beginning of the Fourth Republic to describe local or overseas administrative areas and their populations.

¹⁷ Under the Third and Fourth Republics, the term "organic laws" was applied by convention to laws which dealt with matters which were or might have been regarded as being by nature constitutional, but were capable of being repealed or amended by the ordinary processes of legislation. Under the Fifth Republic, the term is used exclusively of laws passed by Parliament, or imposed by ordinance (see below, p. 271 (Art. 92, para. 1)), in pursuance of a specific injunction in an article of the Constitution. For the methods of repeal or amendment, see Art. 46. The organic law in question is 58-1215 (*Journal Officiel* of Dec. 16, 1958), incorporated in 58-1064 (*Journal Officiel* of Nov. 9, 1958).

The representation of member States of the Community in the college electing the President of the Republic is determined by agreement between the Republic and the member States of the Community.¹⁸

The methods of application of the present article are determined by an organic law.¹⁹

Article 7. The President is elected at the first ballot, if an absolute majority²⁰ is obtained. If this is not obtained at the first ballot, the President of the Republic is elected at the second ballot by a relative majority.

Voting begins at the time fixed by the Government.

The election of the new President takes place not less than twenty and not more than fifty days before the expiry of the existing President's term of office.

If, for whatever reason, the Presidency of the Republic falls vacant, or if the incapacity of the President has been certified by the Constitutional Council, at the request of the Government and by an absolute majority of its members, the functions of the President, except those conferred by articles 11 and 12 below, are performed temporarily by the President of the Senate.^{20a} When a vacancy occurs, or when the incapacity is certified by the Constitutional Council to be permanent, and unless *force majeure* has been certified by the Constitutional Council, the election of a new President takes place not less than twenty and not more than fifty days after the opening of the vacancy or the declaration of the permanence of the incapacity.

Article 8. The President of the Republic appoints the Prime Minister. He terminates his period of office on the presentation by the Prime Minister of the resignation of the Government.²¹

He appoints and dismisses the other members of the Government on the proposal of the Prime Minister.

Article 9. The President of the Republic presides over the Council of Ministers.

¹⁸ Presumably, by separate agreements between the Republic and each of the member States. See also Art. 81 and note.

¹⁹ 58-1064 (*Journal Officiel* of Nov. 9, 1958).

²⁰ The Constitutions of both Fourth and Fifth Republics have used the phrase "by an absolute majority of its members" in cases where the contrast intended was not that between absolute and relative majorities, but that between a majority of members and a majority of those voting. In these cases, the word "absolute" is meaningless, but the terms "*majorité absolue*" and "absolute majority" nevertheless became the common abbreviations among writers, of whom one, at least, ought to have known better. In para. 1 of this Article the use is the normal and correct one. The inaccurate usage has been dropped from Art. 49 of the present Constitution, but kept in Art. 46 and in para. 4 of this Article.

^{20a} Under the Fourth Republic, the President of the National Assembly was interim President of the Republic. It was realised later that if a casual vacancy occurred during a general election, no interim occupant would be available.

²¹ One (certainly unintended) implication of this sentence appears to be that the President cannot refuse the resignation of a Prime Minister, as Presidents of the Third and Fourth Republics more than once did. It may be that the last 13 words represent a concession made by General de Gaulle to his critics.

Article 10. The President of the Republic promulgates laws within the fortnight following their final adoption and transmission to the Government.

Before the end of this period, he may ask Parliament to reconsider²² the whole law or specified articles. This reconsideration cannot be refused.

Article 11. On the proposal of the Government during Parliamentary sessions, or on the joint proposal of the two Assemblies, published in the *Journal Officiel*, the President of the Republic may submit to a referendum any Government Bill dealing with the organisation of the public authorities, approving a Community agreement or authorising the ratification of a treaty which, although not in conflict with the Constitution, would affect the working of institutions.²³

If the result of the referendum is favourable to the adoption of the Bill, the President of the Republic promulgates it within the time-limit laid down in the preceding article.

Article 12. The President of the Republic may pronounce the dissolution of the National Assembly, after consulting the Prime Minister and the Presidents of the Assemblies.

A general election takes place not less than twenty and not more than forty days after the dissolution.

The National Assembly meets as of right on the second Thursday following its election. If this meeting takes place outside the periods fixed for ordinary sessions, a session opens as of right for a period of a fortnight.

No new dissolution may take place during the year following these elections.²⁴

Article 13. The President of the Republic signs such ordinances and decrees as have been considered by the Council of Ministers. He appoints to the civil and military posts of the State. Councillors of State, the Grand Chancellor of the Legion of Honour, Ambassadors and Envoys Extraordinary, Senior Councillors²⁵ of the Court of Accounts, Prefects, Government representatives in Overseas Territories, General Officers, Flag Officers, Air-Marshals, Rectors of Academies and *directeurs*²⁶ of Government departments are

²² *i.e.*, to repeat *ab initio* the whole legislative process in both Houses.

²³ The final phrase is an echo of the long controversy over the European Defence Community, which the French Parliament finally refused to ratify. The Gaullists were anxious to lock the stable door, even though the horse had long been dead.

²⁴ A similar phrase in an "organic law" of the Fourth Republic was interpreted as meaning "within the calendar year following the year in which the election takes place" and another, referring to "a clear day," as meaning "within the 24 hours following the day on which . . ." If these interpretations are followed in this case, the ban on a new dissolution would normally last for much more than 12 months, and might in extreme cases cover nearly two years. It is unlikely that the present President of the Republic would accept this interpretation and it is difficult to see what anybody taking a different view could do officially to challenge his interpretation. Nothing in the Constitution or the relevant organic laws authorises the reference of a point of this kind to the Constitutional Council.

²⁵ "*conseillers-maîtres*."

²⁶ The highest regular civil service post, of which there are five or more per Ministry.

appointed in the Council of Ministers. An organic law ²⁷ determines the other appointments to be made in the Council of Ministers, as also the conditions in which the appointing power of the President of the Republic may be delegated by him and be exercised in his name.

Article 14. The President of the Republic accredits Ambassadors and Envoys Extraordinary to foreign powers; foreign Ambassadors and Envoys Extraordinary are accredited to him.

Article 15. The President of the Republic is Head of the armed forces. He presides over the Higher Councils and Committees of National Defence.

Article 16. When there exists a serious and immediate threat to the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international obligations, and the regular functioning of the constitutional public authorities has been interrupted, the President of the Republic takes the measures required by the circumstances, after consulting officially the Prime Minister, the Presidents of the Assemblies and the Constitutional Council.²⁸

He informs the Nation of these matters by a message.

These measures must be inspired by the desire to ensure to the constitutional public authorities, with the minimum of delay, the means of fulfilling their functions. The Constitutional Council is consulted about them.

Parliament meets as of right.

The National Assembly cannot be dissolved during the [period of] ²⁹ exercise of the exceptional powers.

Article 17. The President of the Republic has the right of pardon.³⁰

Article 18. The President of the Republic communicates with the two Assemblies of Parliament by means of messages which are read for him and on which there is no debate.

If Parliament is not in session, it is specially summoned for this purpose.

²⁷ 58-1136 (*Journal Officiel* of Nov. 29, 1958, corrected in *Journal Officiel* of Dec. 12, 1958). The only significant addition in the organic law to the normal list of appointments subject, in effect, to a Presidential veto is that of university teachers.

²⁸ The organic law on the Constitutional Council stipulates that its opinion in this case must be reasoned and must be published. This rule appears not to apply to the Council's opinion on the measures which the President proposes to take.

²⁹ Literally translated, the French text has "during the exercise of . . ." No provision is made in the Constitution or in any organic law for indicating the points of time at which the exercise of these powers begins and ends.

³⁰ "le droit de faire grace" covers an unlimited right of reprieve and commutation of sentence, for which the number of requests may run into tens of thousands in a year. Art. 65 requires the President to consult the Higher Council of the Judiciary on appeals against the death sentence, and Art. 19 makes all reprieves subject to counter-signature. Presidents under the Fourth Republic dispensed pardons "in the Higher Council of the Judiciary," which they interpreted as a requirement to consult, but did not ask for a counter-signature.

Article 19. The acts of the President of the Republic other than those provided for in articles 8 (para. 1), 11, 12, 16, 18, 54, 56 and 61³¹ are countersigned by the Prime Minister and, where necessary, by the appropriate Ministers.³²

✓ According to the famous Bayeux speech of June 16, 1946, in which General de Gaulle first publicly stated his views on the problem of the Constitution, France needed a régime in which the power of the President of the Republic would offset the consequences of "our perpetual political effervescences." Article 5 of this "Title," which reproduces some of the phrases of the Bayeux speech and bears unmistakably the marks of General de Gaulle's own hand, appears to be intended as a general description of the Presidential powers, itself conferring no rights not expressly conferred by some other Article.³³ Parts of the Article recall phrases used by President Auriol to describe his own functions, though General de Gaulle clearly intends them to describe powers more extensive than those which any President since MacMahon has attempted to exercise.

The widening of the Presidential electorate from less than a thousand to about 80,000 (in December, 1958) also reflects one of the views expressed at Bayeux. It is intended to give the President an authority derived from a body much larger than Parliament, and therefore capable of being used against Parliament if necessary. It will have been noted that while towns of over 9,000 inhabitants are represented in the Presidential electoral college in rough proportion to population, *communes* with fewer than 9,000 inhabitants, and especially those with a population of 2,500 or less, are all heavily over-represented. Presumably, the intention was to give to the electoral college a heavy rural and conservative bias. Like many earlier French electoral calculations, this may some day go astray. The inclusion of delegates from the States of the Community follows from the fact that the President of the Republic is *ex officio* President of the Community,³⁴ but if the composition of the electoral college remains as it was in December, 1958, or unless the negotiations

³¹ *i.e.*, the President is entitled to act alone in the following matters: appointment of the Prime Minister, refusal of a referendum, dissolution, exceptional powers, messages to Parliament, consultation of the Constitutional Council on a treaty or an organic law, appointment of three members of the Constitutional Council.

³² Further powers and duties of the President are set out in Arts. 52, 54, 56, 61, 64, 65, 68, 89, 91 and Title XII.

³³ It is reliably reported that President de Gaulle rebuked the President of the Assembly by letter in January, 1959, for a decision which he (de Gaulle) regarded as unconstitutional. This may have been in pursuance of his conception of "endeavouring to ensure respect for the Constitution." President Auriol once rejected a request to intervene in somewhat similar circumstances. The President, in any case, has no means of compelling acceptance of his views on the proper behaviour of the President of the Assembly.

³⁴ Art. 80.

provided for in Article 6 (4) make startling modifications, it will still be true to say that the President of a Community of eleven African States, Madagascar and France is elected mainly by the mayors of 30,000 or so tiny villages in France.

An organic law provides for formal declarations of candidature for the Presidency. This is an innovation. No requirements are stated, not even that of French citizenship, and the ban on members of former ruling families has been dropped. Nor is there any limit to re-eligibility. The provision for only one further ballot if the absolute majority is not reached on the first is surprising. Three are allowed for the Presidencies of the Assemblies and some other posts, and as the inter-ballot bargaining over the Presidency has to be carried on by an electorate of 80,000 or more, scattered between Antananarivo and Dunkirk, the process is bound to be difficult. The range of Presidential powers is such that agreement seems likely to be more difficult of achievement than ever after the departure of General de Gaulle, for whom the powers were specially tailored.

The President's right to appoint the Prime Minister is a return to the practice of the Third Republic. His presidency of the Council of Ministers could have been no more than the perpetuation of a Third and Fourth Republic practice, but General de Gaulle has quite evidently abandoned the "neutral" chairmanship of former régimes in favour of active and decisive leadership. General de Gaulle regards himself as being in several fields Head of the Government as well as Head of State. The former President of the Council is no more than first Minister, whose function inside the Government is largely one of co-ordination. When he appears before Parliament, however, he is constitutionally responsible for all Government policy and can be dismissed by Parliament. It is not easy to see how this attempt to combine Presidential and parliamentary government can be made to work.

The right to demand a reconsideration of laws is an inheritance from the Fourth Republic, under which, however, it was used only on rare occasions, and then in circumstances which made it welcome to both Government and Parliament. In theory, since this is one of the Presidential acts requiring a counter-signature, the power to ask for the reconsideration ought to belong in effect to the Government, though there are few circumstances in which a Government is likely to want to use it, since, before this stage is reached, it will have used more effective weapons against Bills which it dislikes. If General de Gaulle intends to make it an effective Presidential power (as is probable), this will raise problems about the real meaning of the counter-signature, which are discussed below.

Article 11 is a peculiar affair. What it amounts to is that the President, acting without counter-signature, has the right to refuse a request from either Government or Parliament to submit to a referendum (which would be decisive) a Government Bill falling within one of three limited categories. This means that a Bill could be passed by referendum if President, Government and a majority of the people were in favour of it, or defeated by referendum if President, Parliament and a majority of the people were united in opposition to it. But the Constitution gives useful weapons to both Government and Parliament, which either can use against the other, especially when (as in this case, *ex hypothesi*) the President, with the right to impose or withhold a dissolution, is on the side of those wanting the referendum. Why, in this position of strength, should one not prefer to use the normal methods? Presumably only in special cases (of which the E.D.C. Treaty ratification may have been one), in which some external factor makes one side or the other willing to wound but afraid to strike.

It is probably true to say that no parliamentary system, even a lame parliamentary system like that of the Fifth Republic, can function properly, unless the Head of State has some contingent right of dissolution. Its return, under Article 12, should be welcomed for another reason, too; its existence is already helping to dispel some of the illusory hopes about it which have grown up during its absence. The idea that the threat of dissolution will always bring recalcitrant Deputies to heel is false, for three reasons: first, in the twelve-month (or more) close season after a previous dissolution, it cannot be used at all; secondly, it cannot be used to drive through an unpopular measure of which Deputies are likely to be a good deal more afraid than of the relatively cheap and slight effort of an election campaign; thirdly, it can be a boomerang in the hands of the President; the President is in effect an elected constitutional monarch, and he will discover, as have other constitutional monarchs before him, that to impose or withhold a dissolution is a political act. A President who, in effect, decides that an election is to be fought on a particular issue, and in so doing reveals his own preference, will be in an untenable position if the vote goes against him. Even victory will make it much more difficult for him to appear as the impartial arbiter, above party strife, which he claims to be. On the other hand, if the right of dissolution is kept in the background, as a weapon never or only rarely used, it could have real value. Better still, experience might lead to the view that it would be wiser to place this political weapon in the hands of the Prime Minister, who is a political leader.

Articles 13, 14, 17 and 18 are usual, except as indicated above.^{34a} So is Article 15, though President de Gaulle appears to interpret it more literally than most Presidents have done. Article 19 is the complement of Article 68, which states that the President is irresponsible, except in case of high treason. This, and the consequent requirement of the Prime Minister's countersignature for those Presidential acts for which the Government accepts political responsibility, are normal in French Republican régimes. In the past, many French constitutional lawyers have treated these acts as governmental acts, though they must have involved as a minimum a Presidential right of veto or a Presidential initiative. President de Gaulle probably intends to make them effective Presidential powers, in so far as this can be done, and that will depend, in differing degrees, on convention, the desires and strengths of character of President and Prime Minister, and the will and ability of Parliament effectively to supervise acts in this category. The influence which they enable the President to exercise in private may well amount to a greater real power than that resulting from the rights conferred by the articles listed in Article 19. The right to appoint the Prime Minister is, in effect, subject to the political control of Parliament under Article 49 (i), while the act of dissolution is by nature subject to electoral control. The refusal of referenda, the sending of messages to Parliament, the reference of certain matters to the Constitutional Council and the appointment of a minority of its members are not decisive acts. Much more important is the fact that, despite the unambiguous wording of Article 19, the President acts without countersignature in his capacity as President of the Community.³⁵ The exercise of special powers under Article 16 constitutes a category *sui generis*, which is by nature incapable of parliamentary supervision.

This famous—or notorious—Article 16 is a Gaullist innovation. Its text is an evident compromise between the ideas of General de Gaulle expressed in the Bayeux speech (“it would be his duty, if it should happen that the fatherland were in danger, to be the protector of the independence of the nation and of the treaties concluded by France”) and the modifying influence of some of the co-authors of the Constitution. But closer examination shows that those who wanted to tone down the absoluteness of the General's version received only verbal satisfaction. The Article is a mixture of apparent restrictions and really absolute power: the President may take “exceptional measures” only in a specific conjunction of circumstances—but it is he who has the sole and unchallengeable right to decide if the conjunction is there; he must consult four separate

^{34a} p. 235, n. 27.

³⁵ See below, p. 263, n. 22.

authorities, and the opinion of the authority with the highest prestige, the Constitutional Council, must be published—but he is under no constitutional or legal obligation to take notice of their views; the measures he takes must have a clearly defined purpose—but he is sole judge on that point too; Parliament meets as of right and cannot be dissolved—but there is no evidence that it could do anything, for the President could, if he wished, abolish all its powers for the indefinite period of the emergency, and dissolve it the day after the end of the emergency period if he had not done so before the period began.³⁶ In short, the President's effective powers under this Article are literally unlimited.

It is important to note that, in the minds of the authors of the Constitution, including, if report is accurate, General de Gaulle, the Article confers only reserve powers which, it is hoped, will never be used. At his meeting with the Consultative Constitutional Committee on August 8, 1958, General de Gaulle is reported to have mentioned July 1940, May 1958 and a possible future atomic war as the kind of occasion on which it might be invoked. When M. Debré, the principal author of the Constitution, met the *Conseil d'Etat*, nearly three weeks later,³⁷ he referred only to the possibility of atomic war, which was wiser, since few people believe that the possession of special powers by Presidents Lebrun and Coty would have affected the course of events in 1940 and 1958.

Perhaps the most serious objection to Article 16 is that it is likely to complicate beyond endurance the task of finding a successor to President de Gaulle. If most of France's political leaders and nearly 70 per cent. of her metropolitan electors were prepared to entrust these limitless powers to General de Gaulle, that was partly because the alternative seemed worse, but mainly because General de Gaulle had twice had the opportunity to become a dictator—in 1944 and 1958—and twice refused to use it. Doubtless there are in France other statesmen whose intentions are equally impeccable, but it is unlikely that history will offer any of them similar opportunities of providing conclusive proof of that fact. One wonders, indeed, if it will be possible at all to find a new President, without

³⁶ This raises interesting speculations. In France, neither the law nor the Constitution provides for the recall of a Parliament which has been dissolved. Does this fact offer to an unscrupulous President a way round para. 4 of Art. 16? It is also interesting to note that, according to all constitutional precedent, the measures taken under emergency or special powers remain valid after the period of emergency. As the Constitution is silent on this point, one can only presume that the precedents still hold, though one wonders if that is what the authors of the Constitution intended. The point is, in any case, an academic one, since the validity of terminable measures could be prolonged simply by prolonging the period of emergency.

³⁷ Michel Debré, *La Nouvelle Constitution*, S.I.n.d. (reprinted in *Revue de Science Politique*, Mar. 1959), p. 27.

the revision either of Article 16 or of that part of Article 7 which allows election of the President after only two ballots, and by a relative majority. Gaullists and some others will want to keep Article 16, but not to take the risk of its being used by a Communist. For, whatever the intentions of the authors of Article 16, one indubitable fact emerges: the Article could be used, by any President so minded, to turn himself into an absolute dictator, without infringing in the slightest degree the letter of the Constitution. To a litigious and juridically minded nation, and in a situation in which the only remedy would be civil war, this constitutionalising of dictatorial authority could be of decisive importance.

It should be noted that a score of Articles in other parts of the Constitution, which are discussed in this article as they arise, make important additions to the powers of the President. He negotiates treaties, is in effect the Head of the Judiciary, has special rights as regards revision of the Constitution and the reference of various matters to the Constitutional Council, and exercises nearly all effective power within the Community. All in all, it is probably true to say that the paper Constitution of the Fifth Republic gives to the President a range of Constitutional authority without equal anywhere and certainly unequalled in any democratic régime in French history. What happens in practice to this theoretical authority during the period of office of General de Gaulle will probably be decisive; accumulated precedents could reduce the effective authoritarian possibilities, and in this respect the conflicts of authority discussed in the next section may play a major role. If the trend is the other way, or if the paper powers are merely confirmed in practice, it is difficult to see how the régime can hope to outlast the period of office of its first President.

TITLE III

The Government

Article 20. The Government decides and directs³⁸ the policy of the nation. It has at its disposal the administration and the armed forces.

It is responsible to Parliament in the conditions and in accordance with the procedures laid down in Articles 49 and 50.³⁹

Article 21. The Prime Minister is in general charge of the work⁴⁰ of the Government. He is responsible for National Defence. He ensures the execution of laws. Except as provided for under Article 13, he exercises rule-making power and appoints to civil and military posts.

³⁸ "*conduit*," literally "leads."

³⁹ Which in practice make it responsible only to the National Assembly.

⁴⁰ Literally, "directs the action of," but the overtones of "direct" are very different from those of "*diriger*."

He may delegate certain of his powers to the Ministers.

He deputises for the President of the Republic, when necessary, as Chairman of the Councils and Committees referred to in Article 15.

In exceptional circumstances, he may deputise for him as Chairman of the Council of Ministers, by virtue of an explicit delegation of authority and with a specific agenda.

Article 22. The acts of the Prime Minister are countersigned, where necessary, by the Ministers responsible for their execution.

Article 23. Membership of the Government is incompatible with that of Parliament, with the representation of any trade or professional organisation on the national level, with any public employment or professional⁴¹ activity.

An organic law⁴² lays down the conditions in which the holders of the above offices, functions or employment are to be replaced.

Members of Parliament are replaced in the manner laid down in Article 25.⁴³

TITLE IV

Parliament

Article 24. Parliament is composed of the National Assembly and the Senate. The Deputies of the National Assembly are elected by direct, universal suffrage.

The Senate is elected by indirect suffrage. It represents the territorial entities of the Republic.⁴⁴ French citizens resident abroad are represented in the Senate.

Article 25. An organic law⁴⁵ determines the length of life of each assembly, the number of its members,⁴⁶ the payment made to them,⁴⁷

⁴¹ "professionnel" has a wider sense than "professional"; it covers all forms of regular paid activity.

⁴² 58-1099 (*Journal Officiel* of November 17, 1958). A member of Parliament who accepts Ministerial office ceases to sit in Parliament one month after appointment and may not vote during that month. His seat is taken by a substitute, elected for that purpose at the same time, and whose name figures on the same ballot-paper (or by the candidate on the same list with the next highest number of votes, in the seven metropolitan Senatorial constituencies in which election is by proportional representation). The substitute may not be a candidate at the next election against the member he replaces. Art. 25 of the Constitution makes it clear that Deputies and Senators who become Ministers and then leave office may not return to Parliament until the next election, nor occupy within six months of ceasing to be Ministers any office or employment incompatible with membership of Parliament. Ministers leaving office continue to draw their Ministerial salaries for a period of six months, or until they obtain paid employment.

⁴³ Other articles dealing with the powers of the Government are 8, 9, 19.

⁴⁴ See p. 261, n. 11.

⁴⁵ There are actually seven organic laws on these subjects, as follows: 58-1065 (*Journal Officiel* of Nov. 10, 1958) on the life and composition of the Assembly, completed by 59-225 (*Journal Officiel* of Feb. 7, 1959) on the representation of Overseas territories; 58-1097 (*Journal Officiel* of Nov. 16, 1950) modified by ordinance 59-259 (*Journal Officiel* of Feb. 9, 10, 1959) on the composition of the Senate and term of office of Senators; 58-998 (*Journal Officiel* of Oct. 25, 1958) completed by ordinances 58-1027 (*Journal Officiel* of Oct. 31, 1958) and 59-224 (*Journal Officiel* of Feb. 7, 1959) on eligibility and incompatibilities; and 58-1210 (*Journal Officiel* of Dec. 14, 1958) on payments to members of the assemblies.

For footnotes 46 and 47 see p. 243.

the rules concerning qualification for and disqualification from election⁴⁸ and the incompatibility of certain functions with membership of Parliament.

This organic law also determines the manner of election of those who, in the event of a vacancy, replace Deputies and Senators until the next election, general or partial,⁴⁹ to the assembly in which the vacancy occurs.

Article 26. No member of Parliament may be prosecuted, sought out, arrested, held in custody or tried on account of opinions expressed or votes cast by him in the exercise of his functions.

No member of Parliament may be prosecuted or arrested on account of any crime or misdemeanour⁵⁰ during a parliamentary session, without the consent of the Assembly of which he is a member, except when the member is arrested *flagrante delicto*.

Members of Parliament may be arrested when Parliament is not in session only with the authorisation of the *bureau* of the Assembly of which they are members, except when the arrest is *flagrante delicto*, when the prosecution has [already] been authorised or the final sentence pronounced.

Members are released from custody or their prosecution is suspended if the Assembly of which they are members so demands.

Article 27. Any specific instruction to a member of Parliament [from an outside body] is null and void.⁵¹

The member's right to vote belongs to him alone.

The (*sic*) organic law⁵² may authorise the delegation of the right to vote in exceptional circumstances. In these cases, no member may cast more than one delegated vote.

⁴⁶ The Assembly has 552 members, the Senate 307. The maximum life of the Assembly is five years; the Senate is renewed by thirds every three years.

⁴⁷ "Salary" does not convey the precise sense of "*indemnité*," which implies rather a payment in compensation for loss of earnings elsewhere. The amount fixed is the average of the highest and lowest levels of the salaries of the highest grade of civil servant, plus one-quarter for regular attendance.

⁴⁸ The Constitution refers to "*inéligibilités*," the organic law, more accurately, to "*conditions d'éligibilité*."

⁴⁹ *i.e.*, general, in the case of the Assembly; partial, in the case of the Senate. Deputies or Senators who die, become Ministers or members of the Constitutional Council, or occupy for more than six months an outside function in the public service, are replaced by substitutes elected at the same time as themselves. Other vacancies are filled by by-election. See also n. 42 above.

⁵⁰ "*en matière criminelle ou correctionnelle*."

⁵¹ The existence of a specific instruction (*mandat impératif*) is not easily established and therefore not easily prevented, but this article would, for instance, make it possible for the competent authority to refuse to accept a resignation signed in advance and deposited with the party, of the kind that has been used in some countries by Communist Parties.

⁵² In fact, a separate organic law, 58-1066 (*Journal Officiel* of Nov. 9, 1958). The effect of this article is to forbid two practices which became current under the Third Republic and were officially recognised under the Fourth. Absent deputies regularly left packets of signed voting papers with their friends, who used them as they thought fit. In addition, the leader or secretary of a group was allowed to deposit a single voting paper for his entire group; no Communist vote was cast except in this way. In some Governments, the Prime Minister kept a supply of voting-papers signed by his Ministers, and

Article 28. Parliament meets as of right in two ordinary sessions per year.

The first session begins on the first Tuesday of October and ends on the third Friday of December.

The second session begins on the last Tuesday of April; it may not last more than three months.^{52a}

Article 29. At the request of the Prime Minister or of the majority of the members of the National Assembly, Parliament meets in special session, with a specified agenda.

When the special session is held at the request of members of the National Assembly, the closure decree is read as soon as Parliament has completed the agenda for which it was called and at most twelve days after its meeting.

Only the Prime Minister can ask for a new session before the end of the month⁵³ following the date of the closure decree.

Article 30. Except when Parliament meets as of right,⁵⁴ special sessions are opened and closed by decree of the President of the Republic.

Article 31. Members of the Government have access to both Assemblies. They are heard when they so request.

They may be assisted by Government commissioners.⁵⁵

Article 32. The President of the National Assembly is elected for the life of each Parliament. The President of the Senate is elected after each partial renewal.⁵⁶

Article 33. The sittings of both Assemblies are public. A full report of debates is published in the *Journal Officiel*.

Each assembly may meet in secret session at the request of the Prime Minister or of one-tenth of its members.⁵⁷

used them to ensure Cabinet solidarity—except when, as once happened, a Minister (who remained in the Cabinet) openly tore his paper from the bunch and cast his vote against all his colleagues. The organic law authorises delegation only in cases of illness, accident, serious events in the family, temporary Government missions, military service, attendance at an international body to which the member has been elected by his Assembly, or (during a special session only) absence abroad.

^{52a} Calendar months. In 1959, the session included only 36 sitting days.

⁵³ This clearly means the following calendar month. If, e.g., a session ends on July 2, no further one can be held, except at the request of the Prime Minister, before September 1. The closure decree referred to may presumably be that of all sessions and not only of special sessions, but the point is not completely clear.

⁵⁴ This clause is not supererogatory, as might appear. Parliament meets as of right, but in special session, under Art. 16.

⁵⁵ "*commissaires du Gouvernement*." Note that the term has other meanings in other contexts.

⁵⁶ i.e., the President of the Assembly is elected for five years, failing dissolution, and the President of the Senate for three years. Under the Third and Fourth Republics, election in each case was annual. The intention is to give these officers greater authority.

⁵⁷ Other Articles dealing with Parliament are 10, 11, 12, 16, 18, 59, 61 and 92.

TITLE V

Relations between Parliament and Government

Article 34. Laws are voted by Parliament.⁵⁸

Laws determine the rules concerning:

- civic rights and the fundamental guarantees of the public liberties of the citizen; the obligations of citizens, as regards their persons and property, for purposes of National Defence;
- the nationality, status and legal capacity of persons, property in marriage, inheritance and gifts;
- the definitions of crimes and misdemeanours⁵⁹ and of the penalties applicable to them; criminal procedure, amnesty, the creation of new orders of jurisdiction and the statute of the judiciary;
- the basis of assessment, rate and methods of collection of taxes of all kinds; the currency system.

Laws determine also the rules concerning:

- the electoral system for Parliamentary and local assemblies;
- the creation of categories of public corporation⁶⁰;
- the fundamental guarantees of civil servants and members of the armed forces;
- nationalisations and the transfer of property from the public to the private sectors.

Laws determine the fundamental principles:

- of the general organisation of National Defence;
- of the free administration of local entities, of their powers and of their resources;
- of education;
- of the law of property, of real-property rights and of civil and commercial contract;
- of labour law, trade-union law and social security.

Finance laws determine the resources and obligations of the State, in the manner and with the reservations provided for in an organic law.⁶¹

Programme-laws⁶² determine the purposes of the social and economic action of the State.

⁵⁸ This phrase is restrictive in meaning, and must be read along with Art. 37. Disputes concerning the delimitation of rule-making and law-making powers will be decided in the first place by the President of the Assembly, and if the Government challenges his ruling, by the Constitutional Council. It will presumably also be possible for private citizens to challenge the legal (and by implication the constitutional) validity of decrees before the *Conseil d'Etat*. See also Art. 37, para. 2.

⁵⁹ "délits."

⁶⁰ "établissements publics," institutions enjoying some financial autonomy by virtue of the Acts by which they were created, but subject to some governmental supervision in administrative matters.

⁶¹ 59-2 (*Journal Officiel* of Jan. 2, 1959). This is also the organic law required by Art. 47.

⁶² "lois de programme," a Fifth Republic innovation, involving plans going beyond a single Finance Act, and for which Parliament is considered to have committed itself, by passing the Act, to vote the necessary funds in later budgets.

The provisions of the present article may be completed and more closely defined⁶³ by an organic law.⁶⁴

Article 35. Declarations of war are authorised by Parliament.

Article 36. A state of siege is decreed in the Council of Ministers. Its prolongation beyond twelve days can be authorised only by Parliament.

Article 37. Matters other than those regulated by laws fall within the field of rule-making.

Documents in the form of laws, but dealing with matters falling within the rule-making field⁶⁵ may be modified by decree issued after consultation with the Council of State.⁶⁶ Such of these documents as come into existence after the coming into force of the present Constitution may be modified by decree only if the Constitutional Council has declared them to be within the rule-making sphere, by virtue of the previous paragraph.

Article 38. With a view to carrying out its programme, the Government may seek the authorisation of Parliament, for a limited period of time, to issue ordinances regulating matters normally falling within the field of law-making.

(The) ordinances⁶⁷ are made in the Council of Ministers⁶⁸ after consultation with the Council of State. They come into force upon publication, but cease to be effective if the Bill ratifying

⁶³ "*précisées et complétées.*" "Completed" is a beautiful exercise in ambiguity. Note, however, that Arts. 45 and 46 make the passing of an organic law impossible unless either the Government is willing to facilitate the process or the two Houses are in agreement. It will then be for the Constitutional Council, if any Parliament takes advantage of this paragraph, to determine the precise limits of meaning of the word "completed." The limits of meaning of many other words, like "fundamental principle," "category," will also require definition.

⁶⁴ See also Art. 53, which adds certain types of treaty to the list of matters reserved to law, and Art. 85, which brings revision of Title XII within the law-making field.

⁶⁵ This refers to earlier laws in matters now regarded as falling within the field of rule-making, and presumably also, as the next sentence makes clear, to any others on which the Government may have given way or changed its mind, or on which its view differs from that of an earlier Government.

⁶⁶ *Le Conseil d'Etat*, the chief supervising and co-ordinating body of the administration, adviser to the Government on administrative (and sometimes constitutional) matters, and supreme instance of administrative justice. Its existence and powers are taken for granted in this Constitution, as they were in those of the Third and Fourth Republics.

⁶⁷ This paragraph is not repeated in Art. 47, which also makes provisions for ordinances, but the wording is "*les ordonnances*," i.e., "ordinances" or "the ordinances," not "these ordinances." Precedent or the Constitutional Council will no doubt decide whether the paragraph applies only to ordinances issued by virtue of Art. 38 or to all ordinances. There are good reasons for not applying the same rules to Art. 47, but the final sentence of the Article could refer either to ordinances dealing with matters *not* normally within the field of law, and therefore not issued by virtue of para. 1 of this Article, or to ordinances covering parts of both fields. This is doubtless one of the Articles Professor Capitant had in mind when he made the comment quoted on p. 229.

⁶⁸ By virtue of Arts. 13 and 21, the President of the Republic and the Prime Minister are the rule-making authorities. The effect of this article is to require them to submit their proposals to the Council of Ministers.

them is not laid before Parliament by the date fixed by the enabling Act.

At the expiration of the period mentioned in paragraph 1 of this Article, (the) ordinances may be modified only by law, as regards matters falling within the field of law.

Article 39. Legislative initiative is exercised by the Prime Minister and by members of Parliament.

Government Bills are considered in the Council of Ministers, after consultation with the Council of State⁶⁹ and laid before one of the two assemblies. Finance Bills are submitted first to the National Assembly.

Article 40. Private members' Bills, resolutions and amendments which, if passed, would reduce public revenues or create or increase charges on the revenue are out of order.

Article 41. If, in the course of legislative procedure, it becomes apparent that a private member's proposal or amendment does not fall within the field of law-making, or is in conflict with powers delegated by virtue of Article 38, the Government may demand that it be declared out of order.

In the event of disagreement between the Government and the President of the Assembly concerned, the Constitutional Council gives a ruling, at the request of either party, within a week.

Article 42. Government Bills are discussed, in the assembly to which they are first submitted, on the basis of the Government's text.

An assembly debating a Bill transmitted from the other assembly discusses it on the basis of the text transmitted to it.

Article 43. Government and private members' Bills are sent, at the request of the Government, or of the assembly then discussing them, to Commissions specially appointed for this purpose.

Bills of either type for which such a request has not been made are sent to one of the permanent Commissions, the number of which is limited to six for each assembly.⁷⁰

Article 44. Members of Parliament and the Government⁷¹ have the right of amendment.

When the debate has begun, the Government may object to the discussion of any amendment which has not previously been submitted to the Commission.⁷²

⁶⁹ This is in conformity with an ordinance of 1945 (*i.e.*, prior to the Fourth Republic), which makes consultation of the Council of State obligatory on all Government Bills, as regards their drafting and conformity with previous legislation.

⁷⁰ Each House formerly had 19 specialised Commissions. The new ones are semi-specialised, each covering the work of a group of Ministries. It has been suggested that the *ad hoc* Commissions provided for in para. 1 of this Art. —a Fifth Republic innovation—will be those normally used.

⁷¹ Under the Third and Fourth Republics, Governments had no right of amendment, and had either to find private members to propose amendments for them or use the "rectifying letters," whose original purpose was to correct printers' errors, etc.

⁷² Duverger (*La Cinquième République*, p. 118), reads this paragraph as automatically preventing discussion of such amendments.

If the Government so requests, the assembly concerned accepts or rejects by a single vote the whole or part of the Bill or motion under discussion, together with such amendments as have been proposed or accepted by the Government.⁷³

Article 45. Every Government or private member's Bill is discussed successively in the two assemblies with a view to agreement on identical versions.

When, as a result of disagreement between the two assemblies, a Bill has not been passed after two readings⁷⁴ in each assembly, or, if the Government has declared the Bill urgent, after a single reading by each assembly, the Prime Minister is entitled to have the Bill sent to a joint Committee composed of equal numbers from the two assemblies, with the task of finding agreed versions of the provisions in dispute.

The version prepared by the joint committee may be submitted by the Government to the two assemblies for their approval. No amendment may be accepted without the agreement of the Government.

If the joint committee does not produce an agreed version, or if the version agreed is not approved as provided for in the preceding paragraph, the Government may ask the National Assembly, after one more reading by the National Assembly and by the Senate, to decide the matter. In this case, the National Assembly may adopt either the version prepared by the joint committee or the last version passed by itself, modified, if necessary, by one or any of the amendments passed by the Senate.

Article 46. Laws to which the Constitution gives the status of organic laws are passed or amended in the following conditions.

The Bill, whether Government or private member's, is not debated or voted on in the first assembly in which it is introduced until a fortnight after its introduction.

The procedure of Article 45 applies. Nevertheless, if the two assemblies fail to agree, the Bill may become law only if it is passed at its final reading in the National Assembly by an absolute majority of its members.

Organic laws relating to the Senate must be passed in the same terms by both assemblies.⁷⁵

Organic laws may be promulgated only when the Constitutional Council has certified their conformity with the Constitution.

Article 47. An organic law⁷⁶ lays down the conditions in which Parliament votes Finance Bills.

⁷³ This is quite new.

⁷⁴ "lectures," the complete legislative process (discussion in Commission, followed by three stages of discussion in the full House), within each House.

⁷⁵ It is not clear whether Art. 85 exempts the four organic laws on the Community from the provisions of this Article.

⁷⁶ 59-2 (*Journal Officiel* of Jan. 1, 1959). The procedure, which in itself deserves a separate study, is in essence very similar to, but in words very different from that laid down in the "organic decree" 56-601 (*Journal Officiel* of June 20, 1956). The organic law represents a retreat on paper at least from Keynes in the general direction of Gladstone.

If the National Assembly has not concluded its first reading within forty days from the introduction of the Bill, the Government sends the Bill to the Senate, which must reach a decision within a fortnight. Subsequent procedure is that provided for in Article 45.

If Parliament has reached no decision within seventy days, the provisions of the Bill may be put into force by ordinance.⁷⁷

If the Finance Bill determining revenue and expenditure for the financial year has not been introduced in time to be promulgated before the beginning of the financial year, the Government asks Parliament, as a matter of urgency, for authorisation to levy the taxes voted and to allocate by decree the sums necessary for estimates already approved.

The time limits fixed by the present article are suspended when Parliament is not in session.⁷⁸

The Court of Accounts assists Parliament and the Government to supervise the application of Finance Acts.

Article 48. The agenda of the assemblies gives priority, in the order determined by the Government, to the discussion of Government Bills and private members' Bills accepted by the Government.

Priority is given at one sitting per week to the questions of members of Parliament and the replies of the Government.⁷⁹

Article 49. The Prime Minister, after deliberation in the Council of Ministers, pledges the responsibility of the Government before the National Assembly,⁸⁰ on its programme or, if it be so decided, on a general declaration of policy.

The National Assembly challenges the responsibility of the Government by passing a vote of censure. A censure motion is in order only if it is signed by at least one-tenth of the members of the National Assembly. The vote may not take place until forty-eight hours after its introduction. Only votes in favour of the censure motion are counted, and the motion is carried only if it receives the votes of the majority of the members of the Assembly. If the censure motion is rejected, its signatories may not propose a further one during the same session, except in the case provided for in the next paragraph.

The Prime Minister may, after deliberation in the Council of Ministers, pledge the responsibility of the Government before the National Assembly on the passing of all or part of a Bill or a

⁷⁷ See p. 246, n. 67.

⁷⁸ *i.e.*, for "days" read "Parliamentary days."

⁷⁹ Subject to the provisions of this article, each assembly still determines its own timetable, by the methods in use under the Fourth Republic.

⁸⁰ "*engage devant l'Assemblée Nationale la responsabilité du Gouvernement.*"

The phrase is translated literally, partly because it recurs later, and partly because its meaning, in whatever context, will be determined only by precedent or by the Constitutional Council or by both. At present it appears to mean that the Government will (not "may" as in para. 3) submit itself and its programme to the approval of the Assembly as soon as may be after its appointment, and may later, if it so desires, seek a renewal of this general approval. Under the new rules of procedure, approved and stiffened by the Constitutional Council, approval of parts or particular items of policy can be sought in the National Assembly only in accordance with para. 3 of this article.

motion.⁸¹ In this case, the Bill or part of Bill or motion is regarded as having been passed, unless a censure motion, put down within the following twenty-four hours, is passed in the conditions provided for in the previous paragraph.⁸²

The Prime Minister is entitled to seek the approval of the Senate for a general statement of policy.

Article 50. When the National Assembly passes a motion of censure or rejects the Government's programme or a general statement of Government policy, the Prime Minister must tender to the President of the Republic the resignation of the Government.

Article 51. The closure of ordinary or special sessions is automatically postponed, if need be, in order to permit the application of the provisions of Article 49.

If what sapped and finally destroyed the Fourth Republic was the intractability of one of the main problems with which it had to cope (that of Algeria), the lack of proper collaboration between Government and Parliament was, from beginning to end and by common consent, its central institutional weakness. More detailed diagnoses of this malady varied a great deal. To many English eyes, and to some French ones, the weakness sprang from the lack of any coherent majority capable of producing and supporting a Government which was representative of some common denominator of majority opinion, and this in turn arose partly from the absence on the Right of organised parties, able to make political bargains and keep them, and partly from the presence on the Left of a big *bloc* of Communists, ready to make common cause with any other anti-Government forces for the purpose of defeating Governments, but for no other.

The Gaullist diagnosis was different and the remedy simpler. In the Gaullist view there was "confusion of powers," in the sense that Parliament was strong enough to try to govern as well as to legislate and to supervise the Executive. In this view, the "perpetual political effervescence" of a multi-party system was endemic. So, instead of trying to end the effervescence, Gaullism proposed to build into the system a counter-balancing force, in the form of a strong executive. Logically, that meant a Presidential executive, but as, for many reasons, a Presidential system was unacceptable in France, a bicephalous Executive, with both a powerful President and a Prime

⁸¹ English Parliamentary usage has no generic term equivalent to the French "*texte*," which is used here.

⁸² Under the Fourth Republic, censure motions could be carried and motions of confidence defeated only by a majority of the members of the Assembly, but the Bill on which the question of confidence had been put could be carried or defeated by an ordinary majority of those voting; the Government could therefore at the same time lose its Bill and—in theory—get its vote of confidence. New rules, intended to abolish this paradox, and similar to those of Art. 49, were half way to being voted when the régime collapsed.

Minister, was decided on. Perhaps in part because this bicephalism weakened the Government, it was also considered necessary both to weaken Parliament and in some other ways to strengthen the Government in comparison with Parliament. Finally, the reaction against the Fourth Republic led to the revival of some features of the Third, particularly as regards the Senate. All the changes made by the thirty-two articles of these three "Titles" reflect one or other or several of these judgments and preoccupations.

The Senate again has legislative powers co-ordinate with those of the directly elected House, except when the Government decides otherwise.⁸³ This quite new Governmental power means that, whenever the two Houses disagree, it is possible for the Government to deprive the Senate of what might have become, in practice, its only means of forcing the resignation of a Government. It has, however, the disadvantage that the Government must annoy one of the Houses—either the Senate, by giving the last word to the Assembly, or the Assembly, by allowing the Senate indefinitely to stand in the way of what the Assembly wants. Later Articles also give back to the Senate part of its Third Republic rights as regards revision of the Constitution, allow it to elect half the High Court, in which under the Fourth it had no share and which it monopolised under the Third, and give it co-ordinate rights in setting the Court in motion.

Parliament as a whole is weakened. Its members lose the financial initiative which the Fourth Republic explicitly gave to them, and the rules of procedure by which Article 40 is implemented will probably do what the Fourth Republic tried and failed to do, namely, deprive them of the right to unbalance budgets. They have also lost most of the right to proxy voting and, in addition, under one of the organic laws provided for by Article 25, forfeit up to one-quarter of their *indemnité* if they attend badly.⁸⁴ The reduction in the number and in the degree of specialisation of Parliamentary Commissions is intended to prevent members from acquiring special competences—and corresponding ambitions—rivalling those of Ministers.

The rule compelling Ministers to resign their parliamentary seats is also intended to discourage Ministerial ambitions among Deputies and Senators. It is unpopular with many old parliamentarians, though not with the Gaullists, and there is much speculation as to its probable effects; at the moment, it seems to be leading to technocratic government, and to be creating an even greater gap than before between Government and public opinion, but in different conditions it might

⁸³ Art. 45.

⁸⁴ In practice, only if their voting record is inadequate.

produce weak Ministers, derived from Parliament and afraid of jeopardising both income and career if, after having given up their parliamentary posts, they also risk their governmental one by challenging the Assembly to defeat them. A by-product of the rule is a quite new species of political animal, the "substitute," elected along with the Deputy or Senator, an individual who remains in obscurity unless and until an incident in somebody else's political career suddenly sends him into Parliament, where until the next election he represents, and serves the electors of, the only constituency he is then forbidden to contest. The relations between these people and their colleagues, or between them and those in whose shadows they entered Parliament, must surely also present unexpected problems. There are signs of frustration, too, among members of both Houses, and some at least do not feel that an annual salary, after deductions, of from £2,625 to £3,390 suffices to compensate for lack of political power, which is what politicians seek. On the other hand, the present rules do offer opportunities, like the weekly question-session, which remained inadequately exploited under earlier régimes, probably because most members were too fully occupied with activities now denied to them and which were often unsuited to British conceptions, at least, of parliamentary democracy.

Some of the reforms affecting Parliament as a whole were urgently needed. It is reasonable that the version of Bills which the whole House is asked to discuss should be that of the Government, with the Commission's views as amendments, and it is essential to any Government that it shall have some degree of control of the parliamentary time-table. The procedures for abbreviating debates are replies to delaying devices which previous Parliaments had invented. And the main objection to them is that the ingenuity of Deputies may again find ways of circumventing them; indeed, they make permanent powers which Parliaments have sometimes granted *ad hoc*, in order to limit their own tendency to obstruction!

In these matters, the powers of French Governments are still considerably less than those which British Governments quite normally enjoy. But there is one vital difference: British Governments enjoy these powers not by any indefeasible constitutional right, but only because the parliamentary majority of which the Government is the emanation has itself an interest both in keeping the Government in power and in allowing it to do its work with a minimum of obstruction and criticism. The refusal in most circumstances of the parliamentary majority in Britain to bring down or hinder the Government which it has itself striven to put into office is an expression of elementary self-interest, not of self-abnegation or

of some weakening of Parliament. Many Fourth Republic politicians, indeed, recognised that the strength of British Governments was no more than a consequence of one-party government within a two-party system, and tried by various devices to create in a multi-party system the kind of link between the Government and its majority which in Britain had grown out of political circumstances. General de Gaulle's *Rassemblement du Peuple Français* quite clearly had this purpose, in part at least, and so did experiments tried by President Auriol, M. Mendès-France and M. Guy Mollet. The parliamentary rules of the Fifth Republic represent in part a frank abandonment of attempts of that kind and in part yet another but less understanding effort to translate unwritten British practices into rigid French institutions.

Two probable weaknesses of the new system stand out, among a great many points that raise doubts. Parliament's right to defeat Governments has been limited and circumscribed, first by Article 49 itself, and then still more by the manner in which this article has been interpreted in the revised rules of procedure drawn up by the first Assembly of the Fifth Republic or imposed upon the Assembly by the Constitutional Council. The principle underlying these rules appears to be that a Government is considered strong and entitled to govern so long as a majority of Deputies have not explicitly committed themselves to a vote of censure, even though this "approval" may be due to the fact that any other expression of disapproval is forbidden by the rules themselves. In a country in which party government has so far proved impossible, some attempt to curb irresponsible and demagogic attacks, in which the Government was often brought down almost by accident, was no doubt inevitable. But to try to achieve this by taking one of the silliest inventions of the Fourth Republic and making it even sillier was a mistake, partly because the concealment of political reality makes it no less real, and partly because the rules will so easily be circumvented. To see the example of Britain repeatedly invoked in defence of these rules, which, if they had existed here, would have kept Mr. Churchill out of Downing Street in 1940, is surprising, to say the least of it.

Comparison with Britain and indeed, all talk of a "strong Government," seem equally inappropriate when one considers the position of the French Prime Minister, caught between the President who appoints him and the Assembly which can dismiss him, unable to control foreign policy, attending meetings of Heads of Governments, if and when these are held, only by permission of and in the shadow of the President, cut off from public opinion by a rule

which keeps his Ministers out of Parliament and deprived by the rules of procedure of any accurate measure of his own parliamentary support. It must be remembered that what was promised to the French was not a strong *Government*, but a strong *Executive*, and the present bicephalous arrangement is presumably regarded as fulfilling this promise. In its early months, it appears to be providing a mixture of benevolent autocracy and often equally benevolent but always elusive and sometimes unco-ordinated technocracy. Some of this, however, may well be due less to the nature of the new rules themselves than to the ways in which they are being applied by an Assembly more than half made up of inexperienced Deputies belonging to an organisation with no programme, no discoverable doctrine and no cohesive characteristic, except its members' dislike of the previous régime. Later Parliaments may make the picture look vastly different.

TITLE VI

Treaties and international agreements

Article 52. The President of the Republic negotiates and ratifies treaties.^{84a}

He is informed of the negotiation of any international agreement not subject to ratification.

Article 53. Peace treaties, commercial treaties, treaties or agreements concerning international organisation, those which involve the State in financial obligations, modify the provisions of the law, concern personal status or involve the cession, exchange or addition of territory may be ratified or approved only by virtue of a law.

They take effect only after having been ratified or approved.

No cession, exchange or addition of territory is valid without the consent of the populations concerned.⁸⁵

Article 54. If the Constitutional Council, consulted by the President of the Republic, the Prime Minister or the President of either assembly, has declared that an international obligation includes a clause contrary to the Constitution, authorisation to ratify or approve it may be accorded only after revision of the Constitution.⁸⁶

Article 55. Treaties or agreements regularly ratified or approved have, from the time of publication, an authority superior to that of laws, provided, in the case of each agreement or treaty, that it is applied by the other party.

^{84a} The wording here is the same as in Art. 8 of the Constitutional Law of July 16, 1875.

⁸⁵ Presumably the French are in all cases one of the "populations concerned." The absence of any stipulation as to the manner in which the "consent" is given makes this article, too, ambiguous.

⁸⁶ Neither the Constitution nor the relevant organic law explicitly requires any further consultation of the Constitutional Council, after the revision. If the revised version is not re-submitted, the Constitutional Council has no authority to act on its own.

TITLE VII

The Constitutional Council

Article 56. The Constitutional Council has nine members, whose term of office lasts for nine years and is not renewable. Its members are appointed by thirds every three years. Three members are nominated by the President of the Republic, three by the President of the National Assembly, three by the President of the Senate.

In addition to the nine members provided for above, former Presidents of the Republic are *ex officio* life-members of the Constitutional Council.⁸⁷

The President is appointed by the President of the Republic. He has a casting vote.

Article 57. The functions of a member of the Constitutional Council are incompatible with those of a Minister or member of Parliament.

Other positions incompatible with membership of the Council are listed in an organic law.⁸⁸

Article 58. The Constitutional Council supervises the election of the President of the Republic, with a view to ensuring its regularity.⁸⁹

It investigates objections and proclaims the result.

Article 59. The Constitutional Council decides, in disputed cases, on the regularity of the election of Deputies and Senators.⁹⁰

Article 60. The Constitutional Council supervises the conduct of referenda with a view to ensuring their regularity, and proclaims the results.

Article 61. Organic laws, before their promulgation, and the rules of procedure of the Parliamentary assemblies, before their application, must be submitted to the Constitutional Council, which pronounces on their conformity with the Constitution.

For the same purpose, [ordinary] laws may be submitted to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister or the President of either assembly.

In the cases provided for in the two preceding paragraphs, the Constitutional Council decides within a month. At the request of

⁸⁷ The organic law provides that former Presidents shall take a slightly different oath from the other nine members, and they appear to be less rigidly bound by the rule of secrecy.

⁸⁸ 58-1067 (*Journal Officiel* of Nov. 9, 1958) modified by 59-223 (*Journal Officiel* of Feb. 7, 1959). The only incompatibility added is that with membership of the Economic and Social Council. Members may not be appointed to any public office, nor, if they already hold such office, receive any other than automatic promotion.

⁸⁹ The Council has wide powers in this matter, as in the supervision of referenda. It may, for instance, appoint its own agents in polling stations.

⁹⁰ It can annul an election, or declare a different person elected, or decide that, although irregularities have been established, they did not affect the result of the election and no action is called for. Every decision thus requires a political as well as a legal appreciation of the circumstances.

the Government, however, if the matter is urgent, this period may be reduced to a week.

In these above-mentioned cases, reference to the Constitutional Council prolongs the period allowed for promulgation.

Article 62. A provision declared unconstitutional may not be promulgated or applied.⁹¹

Decisions of the Constitutional Council are not subject to appeal. They are binding on public authorities and on all administrative and judicial authorities.^{91a}

Article 63. An organic law⁹² lays down the organisation and methods of working of the Constitutional Council, the procedures to be followed in referring matters to it and in particular the time-limits within which disputes may be laid before it.

TITLE VIII

The judicial authority

Article 64. The President of the Republic is the protector of the independence of the judicial authority.

He is assisted by the Higher Council of the Judiciary.⁹³

An organic law⁹⁴ regulates the position of the Judiciary.⁹⁵ Judges⁹⁶ are irremovable.

Article 65. The Higher Council of the Judiciary is presided over by the President of the Republic.⁹⁷ The Minister of Justice is *ex officio* its Vice-President. He may deputise for the President of the Republic.

The Higher Council has in addition nine members appointed by the President of the Republic in the conditions laid down by an organic law.⁹⁸

⁹¹ Where the scope of the Council's decision is not explicitly stated, the President of the Republic decides whether to promulgate part of the law or ask Parliament for a reconsideration.

^{91a} Whatever this means, it cannot mean that French courts will now hear pleas of unconstitutionality. Since the Constitutional Council decides *before* promulgation, any law promulgated is *ipso facto* constitutional.

⁹² The organic law is the one required by Art. 57. Except as regards electoral disputes, of which the Council is required by the organic law to treat each on its own merits, neither the law nor the Constitution indicates whether the Council will be bound by the precedents it creates. If, like other recently created French or French-inspired institutions (Community Court, Court of the E.C.S.C.), it models its procedure very largely on that of the *Conseil d'Etat*, it may well decide to keep full records of cases, but not to be bound by them.

⁹³ *Conseil Supérieur de la Magistrature*, q.v. below.

⁹⁴ 58-1270 (*Journal Officiel* of Dec. 23, 1958) completed by 59-226 (*Journal Officiel* of Feb. 7, 1959).

⁹⁵ "porte statut des magistrats."

⁹⁶ "les magistrats du siège," i.e., the whole body of judges, in all courts, as distinct from the body of public prosecutors, who form "la magistrature debout."

⁹⁷ Under the Fourth Republic, the President often effectively presided.

⁹⁸ 58-1271 (*Journal Officiel* of Dec. 23, 1958). The President's choice is more limited than Art. 65 suggests. Seven of the nine members are chosen from three panels, with a total of 21 names, of which two are drawn up by the officers of the *Cour de Cassation* and one by the General Assembly of the

The Higher Council of the Judiciary submits nominations for appointments to the supreme Court of Appeal (*Cour de Cassation*) and to the posts of First President of Assize Courts (*Cours d'Appel*). It gives its opinion, in conditions laid down by the organic law, on the proposals of the Minister of Justice concerning the appointment of other Judges.⁹⁹ It is consulted on reprieves in conditions laid down by an organic law.¹

The Higher Council of the Judiciary sits as the Disciplinary Council for Judges. It is then presided over by the First President of the *Cour de Cassation*.

Article 66. None may be arbitrarily detained.

The judicial authority, guardian of the liberty of the individual, ensures respect for this principle in conditions determined by the law.²

TITLE IX

The High Court of Justice

Article 67. A High Court of Justice is instituted.

It is composed of members elected, from their own numbers and in equal parts, by the National Assembly and the Senate, after each election to these assemblies. It elects its President from among its members.

An organic law³ determines the composition of the High Court, its rules of operation and the procedure applicable before it.

Article 68. The President of the Republic is responsible for actions performed in the carrying out of his duties only in case of high treason. He can be indicted only by identical motions passed by the two assemblies by open ballot⁴ and by an absolute majority of their members; he is tried by the High Court of Justice.

Members of the Government are penally responsible for actions performed in the carrying out of their duties and classed as crimes or misdemeanours⁵ at the time when they were committed. The

Conseil d'Etat. These seven replace 10 members of the Fourth Republic Higher Council, of whom seven were elected by Parliament and four by various sections of the Judiciary. The remaining two are appointed by the President of the Republic, "by reason of their competence"; under the previous régime, the President also appointed two members, "from within the legal profession, but not from among Judges or Public Prosecutors, or from Parliament."

⁹⁹ Under the Fourth Republic, the Higher Council itself made all these appointments.

¹ See p. 235, n. 30. The organic law is the one provided for under the previous paragraph. The Higher Council is consulted as of right on requests for reprieve in the case of death penalties, and may submit observations, or be consulted at the discretion of the President of the Republic, in the case of other penalties.

² *i.e.*, by a law to be passed later. This article was suggested by the Consultative Constitutional Committee. An extensive reform of criminal procedure was promulgated by virtue of Art. 92, para. 3, but it is not clear whether this was, in the minds of its authors, the law referred to in Art. 66. If it was, it must be pointed out that many French jurists are critical of its provisions and would not regard it as adequately reflecting the principle enunciated in this article.

³ 59-1 (*Journal Officiel* of Jan. 3, 1959). The court is composed of 12 members (with six substitutes) from each House.

⁴ On this, see Lidderdale, *The Parliament of France*, p. 141.

⁵ "*délits*."

procedure set out above is applicable to them and to their accomplices in cases of plotting against the security of the State. In the cases provided for in this paragraph, the High Court is bound by the definitions of the crimes and misdemeanours and by the rules as to penalties to be found in the criminal laws in force at the times when the actions were performed.

TITLE X

The Economic and Social Council

Article 69. The Economic and Social Council gives its opinion, at the request of the Government, on such Government Bills, draft ordinances, draft decrees and private members' Bills as are submitted to it.⁶

A member of the Economic and Social Council may be appointed by the Council to appear before the parliamentary assemblies and put forward the opinion of the Council on Bills submitted to it.⁷

Article 70. The Economic and Social Council may also be consulted by the Government on any economic or social problem concerning the Republic or the Community. Any plan or programme-Bill of economic or social character is submitted to it for its opinion.

Article 71. The composition of the Economic and Social Council and its methods of work are laid down in an organic law.⁸

Titles VI, VII, VIII, IX and X call for very little general comment. The right of the President of the Republic to "negotiate treaties"

⁶ Under the Fourth Republic, the Economic Council saw certain Bills, belonging to certain vaguely defined categories, as of right, could also be asked to see others by the National Assembly, and could undertake studies and submit reports on them on its own initiative. It also, as now, advised on economic planning, but not on the Budget. General de Gaulle's original intention was to merge it with the Senate, of which it was to form, as it were, a corporatist section. This project was abandoned at the request of the non-Communist trade-union leaders, who preferred a powerless body with an independent existence.

⁷ This was permitted under the Fourth Republic, but is new as a constitutional right.

⁸ 58-1360 (*Journal Officiel* of Dec. 30, 1958). The Council has 205 members, of which 126, representing, in batches of unequal numbers, manual and clerical workers, civil servants, technicians, engineering technicians, supervisory staff, industrial (including nationalised), commercial and craft undertakings, agriculture (including agricultural co-operatives), and the middle classes are nominated by organisations classed by decree as being the "most representative" of the groups they claim to represent. Another 30 speak for the economic and social activities of Algeria, the Sahara, the Overseas Territories and Overseas *départements*, 22 cover a variety of "social and economic activities," including family associations, while the remaining 15 are experts in the economic, social, scientific and cultural fields. Members are appointed for five years and receive an *indemnité* of not more than one-third of that of members of Parliament. The Council meets every three months in regular session. Its rules of procedure require the approval of the Government. Its reports and opinions, but not its proceedings, are published.

(with the counter-signature of the Prime Minister—whatever, in the circumstances, that may mean) is a return to the theory of the Third Republic. (See p. 254, n. 84a.) It was thought by some of the authors of the Constitution, including M. Guy Mollet, to be intended to describe a purely formal power. In practice, it is already clear that General de Gaulle treats it as putting him in charge of foreign policy. It may be that he intends the power to become more formal as time passes.

—The Constitutional Council is also in a certain sense an innovation. The Fourth Republic had a Constitutional Committee, which functioned only once and then not in the circumstances or for the purposes for which it was invented; it was indeed no more than a safeguard for the reduced powers of the second Chamber, which in practice proved able not merely to defend its own powers but considerably to increase them. The new body, or something like it, is essential to a system which places as much emphasis on the separation of powers as does the Fifth Republic, and is perhaps all the more essential because the separation is far from complete. Since the President spans all three powers and some collaboration between executive and legislature is provided, the vaguely defined frontiers will certainly need authoritative re-definition from time to time. Article 34 (for the reasons given in a footnote), the organic laws and parliamentary rules of procedure should ensure adequate if not full employment for it.

The assemblies' loss of control of their own rules of procedure, a control which they have had under every previous régime, is a big change, but few people have attacked it, probably because they all know how rules of procedure have been used to side-step constitutional provisions. Whether the absence of this element of elasticity proves a loss or a gain probably depends on the Constitutional Council's interpretations of its own role. The loss of the right to validate elections is a different matter. French Parliaments have an unhappy record in their dealings with electoral disputes, and though we are now far from the habits of 1877, when seventy-two opposition Deputies were unseated, an incident as recent as 1951, when the Assembly came to flatly contradictory decisions in two contested cases raising exactly the same problem of interpretation of the electoral law, and the manner of the unseating of a dozen Poujadist Deputies in 1956 (though their candidatures were undoubtedly illegal) have emphasised the need for a change. So nobody will regret the handing over to the Constitutional Council of the task of settling electoral disputes—provided it behaves with reasonable impartiality. Some of the first appointments to it appeared to be politically inspired, and, like its first decisions, have raised unhappy doubts.

✓ The Consultative Constitutional Committee, to which the first draft of the Constitution was submitted, and which, after beginning by deciding to propose far-reaching changes, readjusted its sights after a visit from General de Gaulle and limited its proposals to such changes as seemed likely to be acceptable, nevertheless proposed that the opinion of the Constitutional Council should be binding on the President as regards the existence of circumstances justifying the use of "exceptional powers" under Article 16. General de Gaulle rejected this, on the ground (according to report) that exceptional circumstances might by their nature make it impossible for the Council to meet and so for him to consult it. Illogically, he then accepted the obligation to consult. Many people still believe that nothing would have been lost and much gained by making the decision of the Constitutional Council binding.⁹ It is true that the opinion of the Council is published, and that it would be difficult for a well-intentioned President to flout it, but it might well not be an obstacle to a President with dictatorial ambitions. Further illumination on this point will doubtless be forthcoming if the Government agrees to the many requests for the publication of the record of proceedings of the Consultative Committee, and other preparatory work.

✓ It is important to note that the Constitutional Council is in no sense a Supreme Court. Indeed, it is not a court at all. Of its present members, though most have had some form of legal training at some time, only one has had judicial experience. Though its rulings are binding on courts of law, to the limited extent to which they are likely to concern those courts, it has no control over them and receives no cases from them. A French constitutional convention arising from provisions of the Constitution of 1791 has led French courts consistently to refuse to consider any plea alleging the unconstitutionality of a law, and the new Constitution does nothing to modify this tradition. The Constitutional Council is best thought of as an adjunct to the President in his functions of "endeavouring to ensure respect for the Constitution." It can consider only a limited number of matters. Even some constitutional questions fall outside its purview and some will be settled by other bodies.¹⁰ It can be set in motion (except in electoral disputes) only by a very limited number of people and cannot of its own initiative take up any point. It is therefore an error to compare it in any way with the Supreme Court of the U.S.A.

The change in the status and functions of the Higher Council

⁹ If the Council were unable to meet, a bold President might waive the obligation to consult, by invoking the "traditional principle of public law" (*i.e.*, convention of the Constitution) which lays down that "*à l'impossible nul n'est tenu.*"

¹⁰ See p. 245, n. 58.

of the Judiciary has been the subject of much argument. Though the first Higher Council was created by the Fourth Republic, its preparation began under the Third, and it would probably have come into being in any case if that Republic had survived. Its purpose was to remove the suspicion that political influences affecting the appointment or promotion of judges (formerly in the hands of the Ministry of Justice) might in turn affect the conduct of judges, so, under the Fourth Republic, the Higher Council was given complete control of their appointment and promotion. Six of its thirteen members, however, were appointed by Parliament (from outside its own membership), and though in practice these were jurists, suspicion of political bias and influence persisted. In addition, after twelve years, judicial independence appeared to be no nearer becoming a reality than before, and—perhaps most important of all—officials of the Ministry of Justice continued to regret their lost functions. The Ministry was also the one most closely concerned with the drafting of the new Constitution, which reduces the official status of the Higher Council to that of an auxiliary of the President of the Republic (who has the last word in the appointment of all except the *ex officio* members) and gives back to the Ministry of Justice a part of its former functions.

The existence of a special court for trying persons accused of high treason is a part of the French Republican tradition. Under the Fourth Republic, the court never functioned, and the conditions for setting it in motion make its use even more difficult under the Fifth Republic. The President's irresponsibility under Article 68 is both legal and political; it is, however, very difficult to see what his *de jure* political irresponsibility can add to the *de facto* irresponsibility arising from the general structure and provisions of the Constitution. The Economic and Social Council is an unnecessary but harmless and not very expensive institution, whose existence gives satisfaction to a considerable number of people. If it had any power, or if the Government, having restricted its powers, now intended to treat it seriously, it would still be open to all the objections to corporatist assemblies, which are too well known to every smatterer in political science to need repetition here.

TITLE XI

Territorial Entities¹¹

Article 72. The territorial entities of the Republic are the *communes*,

¹¹ A most unsatisfying translation of "*collectivités territoriales*." This Fourth Republic coinage has a perfectly clear meaning in French; it means a collective being, distinguished from others of the same kind, not by (say) functional differences, but by the geographical area which it inhabits. Any more elegant and intelligible English version would be welcomed by the author.

the *départements*¹² and the Overseas Territories.¹³ Any other territorial entity is created by law.^{13a}

These entities are freely administered¹⁴ by elected councils in conditions laid down by law.

In the *départements* and territories, the Government delegate is responsible for the interests of the nation, supervises the administration and ensures the observance of the law.

Article 73. The status as defined by law¹⁵ and the administrative organisation of the Overseas *départements* may be modified by measures intended to adapt them to local conditions.

Article 74. The Overseas Territories of the Republic have a special organisation which takes account of the interests of each within the framework of the general interests of the Republic. This organisation is laid down and modified by law, after consultation with the Territorial Assembly of the Territory concerned.

Article 75. Citizens of the Republic who do not enjoy ordinary civil status,¹⁶ the only status to which Article 34 may be construed as referring,¹⁷ keep their personal status so long as they have not renounced it.

Article 76. Overseas Territories may keep their status within the Republic. If they express the desire to do so, by a decision of their Territorial Assembly, within the period fixed by Article 91, para. 1, they become either Overseas *départements* or, grouped together or separately, member States of the Community.

TITLE XII

The Community

Article 77. In the Community established by the present Constitution, the States enjoy autonomy; they administer themselves¹⁸ and manage their own affairs, freely and democratically.

¹² The only local government area coming between the *commune* and the State; very approximately equivalent to the English county.

¹³ *i.e.*, such of the former colonies as have not been ceded, converted by the Fourth Republic into Overseas *départements*, or granted independence after the referendum of Sept. 28, 1958, and have not chosen to become "autonomous" states of the Community, by virtue of Art. 76.

^{13a} The final phrase might authorise the creation, without constitutional amendment, of a special status, falling short of independence, for Algeria.

¹⁴ *i.e.*, they are not self-governing. To administer oneself is to apply to oneself rules determined elsewhere.

¹⁵ *i.e.*, as opposed to constitutional status.

¹⁶ *i.e.*, French Moslems in Algeria. "Personal status" means that the holder is subject to Koranic law instead of French law.

¹⁷ *i.e.*, Art. 34 does not confer on the Parliament of the Republic the right to deprive Moslem citizens of their "personal status" without their consent. This, of course, is only a limited safeguard: Parliament or the French electorate can revise Art. 75.

¹⁸ See n. 14 above on "administer." The whole article could be read as meaning that the whole group of States (which includes France) is self-governing on every subject in one way or another; either directly, or through the organs of the Community. Article 86 nevertheless makes clear that "autonomy" is not "independence."

There is in the Community only one citizenship.¹⁹

All citizens are equal before the law, whatever their origin, race or religion. They have the same duties.²⁰

Article 78. The field of competence of the Community includes foreign policy, defence, currency, common economic and financial policy and policy concerning strategic raw materials.²¹

It also includes, in the absence of a special agreement to the contrary, supervision of justice, higher education, the general organisation of external and common transport, and telecommunications.

Special agreements may establish other common fields of competence or provide for any transfer of competence from the Community to one of its members.

Article 79. The member States come within the provisions of Article 77 as soon as they have made the choice provided for in Article 76.

Until the coming into force of the measures necessary for the application of the present Title, matters of common competence will be dealt with by the Republic.

Article 80. The President of the Republic presides over and represents the Community.²²

The latter has as its organs an Executive Council, a Senate and a Court of Arbitration.²³

¹⁹ A later "decision" of the Executive of the Community (*Journal Officiel* of Feb. 17, 1959) stipulates that there is also only one nationality: that "of the Republic and the Community."

²⁰ This is the first time since 1848 and the third time in French history that a French Constitution has included a reference to duties as well as rights. The context gives this point some interest; it refers, of course, to African as well as European citizens of the Community.

²¹ These latter are defined by "decisions." The first list (*Journal Officiel de la Communauté*, April 18, 1959) includes only minerals and other products useful in research or achievement in connection with atomic energy, and hydrocarbons in the form of liquids or gases.

²² *i.e.*, the President of the Republic is *ex officio* President of the Community. This article is not included in the list of those (in Art. 19) describing functions which the President performs without countersignature. All his "decisions" as President of the Community have nevertheless appeared without countersignature. It can, of course, be argued in explanation of this that Art. 19 is intended to cover only those functions which the President of the Republic performs *qua* President of the Republic and not those which he performs *qua* President of the Community. In reply, it can be pointed out, first, that Arts. 77-87 are nevertheless parts of the Constitution and that Art. 80 could perfectly well have been added to the list, and second, that the personage referred to in Art. 80 is the President of the Republic, the same personage as is mentioned in Art. 19, who has as one of his functions the presidency of the Community. It is only in the following article that the two functions begin to be separate. More practically, it can be argued against the use of the countersignature that such a practice would hand over to the Government of one member-State of the Community, France, the effective right of decision on behalf of the President of the Community, which would be contrary to the whole spirit in which the Community was conceived. This is common sense, but it has two consequences. It means, first, that the effective but unwritten revision of the Constitution has already begun, and secondly, that nobody is politically—or legally—responsible for the actions of the President of the Community, as such.

²³ There is also a Secretary-General of the Community, with extensive powers, under the President. The Presidential representatives mentioned in Art. 81 are also, in an important sense, organs of the Community.

Article 81. The member States of the Community take part in the election of the President in the conditions provided for in Article 6.²⁴

The President of the Republic, in his capacity of President of the Community, is represented in each State of the Community.²⁵

Article 82. The Executive Council of the Community is presided over by the President of the Community. It is composed of the Prime Minister of the Republic, the Heads of Government of each of the member States, and the Ministers made responsible, on behalf of the Community, for common affairs.²⁶

The Executive Council organises governmental and administrative co-operation between the members of the Community.

The organisation and methods of work of the Executive Council are determined by an organic law.²⁷

Article 83. The Senate of the Community is composed of delegates chosen from among their own number by the Parliament of the Republic and the legislative assemblies of the other members. The number of delegates from each State is fixed in a manner which takes account of its population and of the responsibilities which it assumes within the Community.²⁸

It holds two sessions a year, which are opened and closed by the President of the Community and may not last longer than one month each.

At the request of the President, it discusses common economic and financial policy before the Parliament of the Republic and,

²⁴ "provided for," not "laid down"—i.e., the agreements to be negotiated could for instance, considerably increase the representation of overseas States of the Community in the Presidential electoral college. Representation in proportion to population would give them nearly 25 per cent. of the College.

²⁵ A "decision" of Feb. 9, 1959 (*Journal Officiel* of Feb. 17, 1959), published after prolonged argument, specifies that this representative, and not the local Government, is responsible for ensuring within each member State the execution of decisions of the Executive Council of the Community. Some Prime Ministers of member States have regretted the lack of consultation on these appointments.

²⁶ In the first Executive, all the Ministers in the latter category, who are appointed by the President, are in fact the Ministers of the Republic responsible for the same subjects. Since France is also a member of the Community, no other arrangement would have been practicable. A decree of May 27, 1959, created four posts of "*Ministre-Conseiller*." These (at present three African and one Madagascan) may be summoned to either the Executive of the Community or the Cabinet of the Republic.

²⁷ 58-1254 (*Journal Officiel* of Dec. 20, 1958). The Executive meets when and where it is summoned by the President, with an agenda drawn up by the President, who can also co-opt Ministers from any member State, at his own choice. It fulfils the functions stated in Art. 78 and apportions the administrative expenses and the cost of the common activities of the Community. It also takes the main administrative and political decisions. Its method of working is an attempt to institutionalise British Cabinet practice: no votes are taken; the Executive "deliberates" and the President then (or subsequently?) "formulates and communicates" its decisions.

²⁸ This formula would have made possible an overwhelming majority of members from the Republic, which in practice bears all the responsibilities. In fact, on a strictly proportionate population basis, the Republic is under-represented, its 65 millions (including those of Algeria and the Sahara and the Overseas *départements* and Territories) having 186 members, and the 12 other member States, with a total population of 25 millions, having 98 members.

in appropriate circumstances, the legislative assemblies of other members of the Community pass laws in this field.

The Senate of the Community considers the acts, international agreements, and treaties referred to in Articles 35²⁹ and 53, where these involve obligations for the Community.

It takes binding decisions in the fields in which power has been delegated to it by the legislative assemblies of members of the Community. The decisions are promulgated in the States concerned in the same ways as the laws of the territories.

An organic law³⁰ determines its composition and the rules under which it functions.

Article 84. A Court of Arbitration of the Community gives rulings on disputes between members of the Community.

Its composition and powers are determined by an organic law.³¹

Article 85. Notwithstanding the procedure provided for in Article 89, the provisions of the present Title concerning the functioning

²⁹ i.e., declarations of war.

³⁰ 58-1255 (*Journal Officiel* of Dec. 20, 1958). The Senate has a maximum of 300 members (284 at present), who sit for five years and may be re-elected. Its rules on voting rights and immunity from arrest, etc., are the same as those of the French Parliament. In addition to the powers specified in Art. 82³ (all advisory, except in the improbable event of a member State or States delegating powers of decision to it), it has powers of revision of the appropriate articles of the Community and organic laws, co-ordinate with those of the Parliament of the Republic. Its powers as regards treaties and declarations of war are purely advisory. It may be consulted by the President on any matter of common interest and may on its own initiative (its only right of initiative) make recommendations "for the harmonisation of the legislation of member States." Its members may question Ministers of the Community. It is summoned by the President, who may also call special sessions of not more than 10 days each. The President's items have priority on its agenda. For the time being, it meets in the Luxembourg Palace when the Senate of the Republic is not sitting. A further organic law, 58-1257 (*Journal Officiel* of Dec. 20, 1958), regulates the election to the Senate of the Community of the members of the Parliament of the Republic. Its purpose is to ensure equitable representation within the Republic delegation of Algeria and the Sahara, the Overseas *départements* and Overseas Territories, all of which are parts of the Republic.

³¹ 58-1256 (*Journal Officiel* of Dec. 20, 1958). The Court consists of seven Judges appointed for six years by the President. They are irremovable and re-eligible. They must have had at least 10 years' service as Judges, members of the *Conseil d'État* or Professors of Law, or 20 years if they have any other qualification, which must be in the legal profession. Their honours, prerogatives and salaries are decided by the President of the Community. The Court hears disputes between members of the Community on constitutional provisions and organic laws referring to the Community, and on agreements between members, as well as any other dispute brought before it by agreement. It can issue injunctions and award damages. It also deals, at the request of the President of the Community, with disputed elections to the Senate of the Community, and it advises the President, at his request, on questions of constitutional and organic law concerning the Community. Matters may be referred to it only by the President, the member States or the organs of the Community. Cases concerning individuals may be brought only by Governments and then only when the individual has exhausted the internal procedures of the State against which his case is brought. Its procedure is very similar to that of the *Conseil d'État*. Its decisions are binding, without appeal, in all the territories of the Community. In addition to the organic law, an ordinance, 59-419 (*Journal Officiel* of Mar. 15, 1959) makes the *Conseil d'État* the administrative court of the Community.

of the common institutions of the Community are revised by laws couched in the same terms passed by the Parliament of the Republic and by the Senate of the Community.

Article 86. A change of the status of a member State of the Community may be requested either by the Republic, or by a resolution of the legislative assembly of the State concerned, confirmed by a local referendum, organised and supervised by the institutions of the Community. The methods by which the change of status is made are determined by an agreement approved by the Parliament of the Republic and the legislative assembly concerned.

In the same manner, a member State of the Community may become independent. It thereby ceases to belong to the Community.³²

Article 87. Special agreements concluded in application of the present title require the approval of the Parliament of the Republic and of the legislative assembly concerned.

TITLE XIII

Agreements of association

Article 88. The Republic or the Community may conclude agreements with States desiring to form an association with either, in order to develop their civilisations.

The three "Titles" dealing with former French dependent territories constitute a bold and imaginative effort to solve the problem of the future relations of these territories with France. This was one of the fields in which, on the whole, the efforts of the Fourth Republic had been successful. Indo-China, it is true, had been lost and the friendship of Tunisia and Morocco had been preserved only by a very belated transformation of their Protectorate status into one of independence. Algeria was an unsolved problem, but it still is, and nothing in the text of the Constitution offers any clue as to what future status is contemplated for it. Relations with the remaining Overseas Territories were good, and had been still further improved by the "outline-law" (*loi-cadre*) of 1956. Many people, however, believed that the outline-law went beyond what was permitted by a strict interpretation of the Constitution. A revision of the Constitution to meet this difficulty was already under discussion, and these three Titles do what many people hoped that revision would do—

³² This Article, which many people regard as the most important of the Constitution, was added by General de Gaulle to the original draft, after his tour of the French Union immediately before the final drafting of the Constitution. It was during the same tour that he offered immediate independence to territories whose population voted in majority against the draft Constitution, a promise of which only Guinea took advantage. Note, however, that para. 1 gives to the Republic, and not to the Community, a right of veto on proposed further constitutional changes.

get rid of some of the rigidities and open the road to an evolution of which the precise form cannot be foreseen. It will have been noted that Articles 85 and 86 make it easier to change this than any other part of the Constitution. The omission of any reference to Algeria was doubtless intended, in part, and in some minds at least, to leave open the door to even wider possibilities of evolution there.

The most rigid provisions of this section are those of Article 76, which in logic belongs to Title XV. It offered the possibility of change to the Overseas *départements* (which have never asked for any) and gave to those territories not opting for the Community a once-for-all choice between remaining as Overseas Territories or becoming Overseas *départements*, within the Republic in either case.³³ It is not easy to imagine any of these territories regretting their choice in any foreseeable circumstances—but the unforeseeable sometimes happens, and the rigidity may yet be regretted.

The Community is not a French version of the Commonwealth, though the “association,” for whose future existence Article 88 expresses a hope, might become something like the Commonwealth. It is intended, if it does come into being, to embrace Morocco, Tunisia, possibly Guinea, any States which leave the Community by virtue of the provisions of Article 86, and perhaps Algeria, with some new and unforeseeable status. For any other purpose, a formation like the Commonwealth, with neither constitution nor institutions nor any single clearly definable bond of association, would be unsuited to the juridically-minded French.

Nor is the Community a federation or confederation on the model of any so far known. The only structure capable of bringing together one wealthy and politically experienced State with twelve poor and politically inexperienced States must have institutions expressing both the principle of equality and the fact of inequality. The structure and procedure of the Executive Council are intended to meet this need. A procedure like that of the British Cabinet makes it possible for opinions to be weighed rather than counted, and the President’s right to “formulate and communicate” its decisions is intended to make possible an evolving compromise between the realities of financial dependence and tutelage and the theoretical equality without which the African States would not have agreed to the project.

Whether a method modelled on that of the British Cabinet can work in practice is far from certain. British Cabinets are held together by a common party interest, and all their members are responsible,

³³ No Territory chose to become a new Overseas *département*. Five small ones (the Comoro Archipelago, French Somaliland, St. Pierre-et-Miquelon, New Caledonia and French Oceania) chose to remain Overseas Territories.

through one Parliament, to one electorate. The members of the Executive of the Community belong to different parties and different States, and are responsible through thirteen different Parliaments to thirteen different electorates. The strain on Executive unity must often be heavy, but four factors which at the moment help to make it work are: a common desire for success, a common recognition of the need for a long time to come for financial, technical and administrative help from one of the thirteen to the other twelve, a common confidence in the President, and the latter's inexhaustible capacity for finding elastic or face-saving formulae.

The Senate is a less happy affair. Its powers are more restricted even than those of the Assembly of the Union, which it replaces, and all experience suggests that pseudo-parliamentary assemblies lead first to self-deception and then rapidly to frustration. This weakness reflects the central problem of the Community, which is that it cannot, for a very long time at best, be democratic in the head-counting sense of that term. France cannot allow her policy to be determined and her funds allocated by twelve other States. Since France is a member of the Community and cannot have two policies, Community policy will have to be French policy, and French policy can be determined only by French political institutions. The Court of Arbitration, on the other hand, is a necessary institution, even in a semi-federal body.

The keystone of the whole structure is the President. The list of his powers within the Community is a formidable one. Alone, he decides the meeting-place, time and agenda of the Executive and appoints or co-opts members above the basic thirteen, without constitutional or legal limit as to their character or number. He creates and appoints to its sub-committees and presides at the full Council, whose decisions he "formulates and communicates." He summons and prorogues the Senate, determines part of its agenda and, if he wishes, the order of discussion. He is head of the administration, appoints its staff and is responsible for the application of Executive decisions. He appoints the judges, President and staff of the court, decides their salaries and alone submits questions to them on election results, the Constitution, organic laws and Community agreements. He has the right of pardon and may decide to exercise in all or any of the States the unlimited "exceptional powers" provided by Article 16.³⁴ With the approval of the Executive Council, he appoints the Secretary-General and organises the administration. It is his representatives, appointed by and

³⁴ "Decision" of the Executive Council of Jan. 14, 1959 (*Journal Officiel* of April 18, 1959).

responsible to him, who are responsible for the application in the States of the Community decisions, which cover all the decisive areas of political action. In his actions as President of the Community he is responsible to nobody and nobody bears responsibility on his behalf before any democratic assembly or any electorate. The Executive, with which he works, is not in any normal sense a Cabinet and is not itself responsible either to the Senate (which in any case is not a Parliament) or, collectively, to any other body.

It is reasonable to ask why General de Gaulle thought it necessary to concentrate this unprecedented array of powers in his own hands, and why his colleagues have agreed to this with only occasional protests on minor and scattered details. The answer to the first question is probably that the President did not trust his own countrymen or their elected representatives to accept a rapid enough rate of evolution towards something more closely resembling a federation or confederation. To the second, part of the answer certainly is that African opinion trusts General de Gaulle as it trusts nobody else. The President has done two things—in this field—that nobody else could have done. He challenged the African States to take their independence on September 28, 1958, if they were prepared to pay the price, and kept his word when Guinea took up the challenge. And he wrote into the Constitution Article 86, which gives the States the right to negotiate, at any time, the terms of their own future independence. It is Article 86 which transforms the whole climate. Apart from their Prime Ministers' voices in the Executive, the States have powers scarcely any greater than those they had under the outline-law of 1956, but even severely limited powers look totally different when equality is proclaimed and its forms respected, and when the goal of independence is visible, though perhaps distant. The second reason, of course, is that most African politicians know perfectly well the straits they would be in without the massive material, technical and financial assistance they receive from France. If the rate of financial aid is kept up, if the pace of evolution towards a more democratic federalism is at least measurable, and if General de Gaulle remains at the helm long enough, they may themselves wish to postpone independence indefinitely.

There are, of course, many problems. Personal quarrels and conflicts of competence are innumerable. The Executive has to find methods of smooth and effective working and the Senate to be saved from frustration. The French people may not always be willing to pay out vast sums to States which are free to leave the Community

with a minimum of formality, and, on the other hand, popular pressure for real independence, in a continent where others are moving faster still, may set a pace faster than French opinion can tolerate. Finally, the problem of the succession to General de Gaulle, discussed elsewhere in this article in relation to the Republic, is even more acute as regards the Community. It is impossible to imagine that anybody else could carry French opinion along far enough and fast enough, hold back African opinion to something like a reasonable rate of evolution, and meanwhile command a confidence wide enough to make any of those concerned willing to hand over to him the immeasurable powers which the present President so nonchalantly wields.

TITLE XIV

Revision ³⁵

Article 89. The right to propose amendments to the Constitution belongs concurrently to the President of the Republic, on the proposal of the Prime Minister, and to members of Parliament.

The amending project or proposal must be passed by the two assemblies in the identical terms. The amendment becomes effective when it has been approved by referendum.

However, the amending project is not submitted to a referendum when the President of the Republic decides to submit it to Parliament, meeting as Congress ³⁶; in this case the amendment is accepted only if it obtains a majority of three-fifths of the votes cast. The Bureau of the Congress is that of the National Assembly.³⁷

The amendment procedure may not be initiated or pursued when the integrity of the territory is under attack.³⁸

The Republican form of government is not subject to revision.³⁹

³⁵ See also Arts. 85 and 86 and below, pp. 272-273.

³⁶ The name given under the Third Republic to joint meetings of both Houses.

³⁷ None of this is clear. Paras. 1 and 2 speak of "*projets*" and "*propositions*," i.e., Government and Private Members' proposals. Para. 3 speaks only of "*projets*." Is this an accidental omission, or does it mean that only Government proposals can be submitted to Congress? Why must the Prime Minister, when the initiative is his, act only through the President? There is no such thing as a Presidential Bill. In what form does the proposal appear before Parliament? Does the ordinary legislative procedure apply (as it did under the Fourth Republic), including all the provisions of Art. 45? Does it also apply before Congress?

³⁸ "*lorsqu'il est porté atteinte à l'intégrité du territoire*," a phrase which would permit of many interpretations. It refers, not to the type of change proposed, but to the circumstances reigning at the time of the proposal. Art. 94 of the Fourth-Republic Constitution forbade revision when all or part of metropolitan France was occupied by foreign troops. The new text is intended to cover other types of threat. It has been suggested that it might be used to prevent any attempt at revision while a rebellion was in progress in any part of the territory of the Community. Experience suggests that French constitutional lawyers could expand or contract its meaning as circumstances may require.

³⁹ "*ne peut faire l'objet d'une révision*." These are almost the exact words of part of the celebrated Art. 2 of the revision of 1884.

TITLE XV

Temporary dispositions

Article 90. The ordinary session of Parliament is suspended. The term of office of the members of the present National Assembly will expire on the day the Assembly elected by virtue of the present Constitution meets.

Until this meeting, only the Government has authority to summon Parliament.

The term of office of the members of the Assembly of the French Union will expire at the same time as the term of the members of the present National Assembly.

Article 91. The institutions of the Republic provided for in the present Constitution will be set up within a period of four months from the day of its promulgation.

This period is extended to six months for the institutions of the Community.

The powers of the present President of the Republic will expire only on the proclamation of the results of the election provided for in Articles 6 and 7 of the present Constitution.

The member States of the Community will take part in this first election in conditions appropriate to their status at the date of the promulgation of the Constitution.

The established authorities will continue to exercise their functions in these States in accordance with the laws and other instruments applicable on the date at which the Constitution enters into force, until the installation of the authorities provided for by their new form of government.

Until its constitution has been finally determined, the Senate consists of the present members of the Council of the Republic. The organic laws which will determine the final constitution of the Senate must come into existence before July 31, 1959.⁴⁰

The powers conferred on the Constitutional Council by Articles 58 and 59 of the Constitution will be exercised, until the installation of the Council, by a Commission composed of the Vice-President of the Council of State as chairman, the First President of the *Cour de Cassation* and the First President of the Court of Accounts.

The peoples of the member States of the Community continue to be represented in Parliament until the coming into force of the measures necessary for the application of Title XII.

Article 92. The legislative measures necessary for the installation of the institutions and, until that installation, for the functioning of the public authorities, will be taken in the Council of Ministers, after consultation with the Council of State, by ordinances having the force of law.

During the period prescribed in the first paragraph of Article 91 the Government is authorised to determine, by ordinances having the force of law and issued in the same form, the electoral system for the assemblies provided for by the Constitution.⁴¹

⁴⁰ See p. 242, n. 45.

⁴¹ General de Gaulle had assured the National Assembly, through one of his Ministers, that the special powers granted to him on June 1, 1958, would not be

During the same period and in the same conditions, the Government may also take, on any subject, such measures as it may consider necessary to the life of the nation, the protection of the citizens or the preservation of freedom.

The present law will be applied as the Constitution of the Republic and of the Community.

It is neither cynicism nor pessimism that makes one wonder if this Constitution can survive. Its authors are themselves in sufficient doubt to find it necessary to warn their countrymen of the dangers they foresee if it does not survive. Indeed, changing Constitutions has seemed at times to be one of the normal processes of French government, regulated by an unwritten super-Constitution of its own. The last French Constitution lasted only twelve years, which was also the average life of all its predecessors since 1791. This one made enemies from the start by the manner of its coming into being, and though some of these are now changing their minds, the processes that reconcile old enemies also lose former friends. There are also inherent defects—and virtues.

In English eyes, the greatest of the virtues is the scope for peaceful evolution, adaptation and re-interpretation left by deliberate provision in some cases and by ambiguity, intentional and unintentional, in others. The authors of the Constitution intended to apply half of Napoleon's famous dictum; they set out to be brief and clear. In the end, ninety-two Articles, some covering half a dozen subjects, do not add up to brevity, and the reader will have seen for himself how obscure some of them are. Fortunately, obscurity often means elasticity, and even many of the more precise parts can be re-interpreted or simply ignored, when legislation is not involved or when President, Government and Parliament can agree to leave the Constitutional Council out of the picture.

To the English analyst, the opportunities offered by obscurity

used in order to change the electoral system. He kept the letter of his word. Instead, he used another power then given him, the power to prepare a new draft Constitution, in order to insert a clause giving him power to change the electoral law. The justification for this otherwise dubious procedure was that the first Parliament of the Fourth Republic had shown itself almost incapable, and the second Parliament totally incapable, of finding a majority for any proposed change, although the majority in the first case and nearly the whole of the Assembly in the second agreed that a change was needed. The system chosen for the Assembly was the single-member system, with a second ballot where no candidate receives an absolute majority at the first ballot—the system used in 13 elections between 1875 and 1936. Two changes were made: a deposit is required and is forfeited by candidates receiving less than 5 per cent. of the first-ballot votes; these candidates must withdraw, and no new ones may be nominated. For the Algerian constituencies, the majority-list system, with one ballot only, was preferred, each party being required to have a prescribed proportion of Moslems, making 46 out of 67 in all, on its list. For the Senate, all but seven large constituencies, which use proportional representation, also have the second-ballot system.

and omission seem likely to be as much needed as the openings deliberately left for evolution in Title XII. Even if one sets aside the quite comprehensible fears aroused by Articles like 16, 34, and 47, if one looks at the document in the spirit in which it was conceived and makes the most optimistic assumptions about the intentions and the capacity of those who work it, four closely related major weaknesses stand out. They are the excessive powers of, and burden laid on, the President, the curious and surely ultimately unworkable division of executive powers, the risk of frustration in Parliament and the equal risk of divorce between policy and public opinion.

The President's powers are not only too great to be tolerated for long by a democracy, or in the hands of any but their present holder; they are also too many to be exercised efficiently by one man, even with the invaluable aid of the civil and military *cabinets*, the personal secretariats onto whom so much of the burden is discharged. Nor does their range conform with the theory of the separation of powers, on which General de Gaulle and his friends have laid so much emphasis, or with the notion of the President as "arbitrator," which they seem to have adapted from the highly idealised Maurrasian picture of the Monarchy. The President has to guide the working and evolution of the Community, either alone or through his own nominees, watch over the Constitution and the development of its practices and institutions, supervise the Judiciary, approve or disapprove many appointments, preside in person over the Cabinet, the Higher Council of the Judiciary, the Executive of the Community and the principal defence Committees, receive Ambassadors and carry out the customary ceremonial functions of the Presidency, as well as following day-to-day politics closely enough to know when to dissolve Parliament, what Bills to send to the Constitutional Council or allow to be submitted to referenda, and appoint the Prime Minister when necessary. In addition to all this, President de Gaulle in practice directs foreign and defence policy and the evolution of the Algerian problem and stumps the country and the Community at intervals of about once a month, in an effort to bridge the growing gap between popular opinion and public policy.

Even a young man could not carry this immense burden for long, or do half these things with reasonable efficiency, and Presidents are not usually young men. If one adds this to the doubts expressed above (p. 240) on the probable difficulty of agreement on a successor to exercise General de Gaulle's powers, it is clear that changes must come. Some of his friends have suggested that the President intends gradually to discharge some of his powers onto the Government or

Parliament, leaving them written into the Constitution as prerogative powers to be used by the President only in un hoped-for emergencies and exercised in practice by others. Such an intention would be consistent both with the desire to emulate British habits and with the long-standing French habit of making rigid provisions with the conscious intention of ignoring or modifying them in practice. But this intention, if it exists, might be frustrated by events, or by traditional fears, at every point of the political spectrum, of what an opponent might do with the powers; for though Frenchmen in the past have often consented to relax restrictions which they had themselves imposed on authority, they have been much less ready to grant wide powers and then limit them in practice. Perhaps if the thing is to be made to work, a mixture of formal and informal modification may be necessary.

A change of that kind would involve further changes right through the system, which might provide solutions of the other problems. Whether the President really becomes an impartial and occasional "arbitrator," or whether the deliberate choice of weak men to hold the office, which so many commentators anticipate, turns the clock back to the days of the Third Republic, either Government or Parliament must recover some of their lost powers. If this begins to happen, some clarification of traditional thinking would be a help. It is customarily said, both in France and elsewhere, that the executive in French democratic régimes has been too weak. This is muddled thinking. The powers of the French executive *as a whole* have steadily increased under every régime, not excluding that of the Fourth Republic.⁴² Inheritance from the *ancien régime*, from the dictatorships and from wars and crises, the effects of the notions of *pouvoirs de police* and of the *acte de gouvernement*, direct rule in the colonies and the tutelary system in local government, and finally the simple need to run the country while Parliaments and Cabinets quarrelled within themselves and with each other, have allowed various elements of the executive to exercise virtually unchecked power on a vast scale. What has been lacking has been cohesion within and durability at the top. The lack of durability is common knowledge. Cohesion has been lacking in two ways: different parts of the bureaucracy and individual Ministers have regularly gone their own ways, the latter often acting in vital questions without the knowledge or approval of Parliament or their Cabinet colleagues and the former without the approval of and often against the specific instructions of their Ministerial chiefs. What was needed, therefore, was not so

⁴² On some of the increases of executive power under that régime see Galichon, *Aspects de la Procédure Législative en France* in *Revue Française de Science Politique*, October 1954, pp. 434 *et seq.*

much an increase of the powers of the Government, as a reorganisation of its internal functioning and of its relations with Parliament. The first needs were for Ministers to learn to work with each other and control their own departments, instead of leaving the bureaucracy to run itself while they sought purely political advantages at the expense of those who were supposed to be their colleagues, and for Parliament to learn to act as a two-way channel of communication between public opinion and a Government whose day-to-day working it supervised, instead of itself trying to govern.

Some of the reforms go some way towards these ends. The various devices for giving the Government more effective legislative initiative and more control of parliamentary time were much needed and should be helpful. But the attempt at a clear-cut separation of legislative from rule-making power is dangerous not so much in itself, as because the method chosen is that of defining the law-making, rather than the rule-making domain. This leaves all residuary powers in the hands of the executive, unless it is specifically and successfully challenged on this matter by virtue of the last line of Article 34. (The problems of interpretation which then arise have been mentioned in a footnote.) It also leaves to the executive the right of decision as to what are residuary powers, unless it proves possible for that decision to be challenged before the *Conseil d'Etat*.

The attempts to use Article 49 in order to conceal the precise extent of parliamentary opposition are both undignified and illogical. There was no dignity in borrowing the panicky proposals inspired by the death-bed repentance of the Fourth Republic, and the Fifth was supposed to have a quite different logic of its own, based on the notion that strong Presidential authority made irresponsible parliamentary behaviour less dangerous. The rule of incompatibility between Ministerial office and the parliamentary function, which increases the frustrations of Deputies and Senators and prevents Deputies from forming a much-needed link with public opinion, was also an unwise addition to all the other remedies. When doctors with different diagnoses write different prescriptions, there is no wisdom in swallowing *all* their concoctions.

It is quite possible that all these ideas, or something like them, are already in the mind of General de Gaulle. It became clear soon after he returned to power that his major aim in constitutional matters was to create an efficient democracy. The first results of the new Constitution and the manner of its application have not appeared either very democratic or very efficient, but that may be due to other things. For the General had other purposes too. The

effort to cope with the Algerian problem, the economic problem and the problem of France's position in the world was what, more than anything else, had defeated his predecessors. We do not yet know how much of current methods are inspired only by the need to deal with these problems, how far the problems can be dealt with, or how quickly, how far it is intended to change the methods if and when the worst of the problems have been solved or have solved themselves, how far the intentions themselves, if they are there, will change under the impact of power, or how far, at the best, the right kind of evolution will be possible. What is certain is that too great rigidity, or evolution towards even greater personal power, would lead only to yet another stage of the dreary cycle of revolution and counter-revolution, which surely nobody wants to perpetuate.

THE USE OF COMMITTEES BY THE HOUSE OF COMMONS

A. H. HANSON and H. V. WISEMAN

PUBLICATION of this article was initially prevented by a House of Commons Resolution of 1837, which established as a breach of privilege the publication of any evidence submitted to a Select Committee but not reported to the House. It arose out of the publication in *The True Sun* of evidence taken before the Select Committee on the Poor Law Amendment Bill, such evidence having been passed on by Mr. D. W. Harvey, a member of the Select Committee and the proprietor of the newspaper. Lord John Russell, in moving the Resolution, said that public security sometimes demanded that evidence should not be published. Mr. Speaker pointed out that it was only since 1814 that evidence had been printed, and that this was solely for the convenience of members of Select Committees. Publication could follow only with the authority of the House.¹

The present memorandum was not refused publication for "security" reasons! The Select Committee on Procedure, to which it was submitted, did not print papers which were unaccompanied by oral evidence. The authors were not invited to give such evidence, although they would have been willing to do so. The decision not to print meant, technically, that no report was made to the House. Thus the 1837 Resolution applied.

The authors wish to express their gratitude to Mr. R. A. Butler, Leader of the House, and to Mr. Charles Pannell, M.P., for their exertions on behalf of this modest essay. On June 11, 1959, Mr. Pannell drew attention to a Motion, signed by seven other members of the Select Committee, that permission to publish be given.² On June 18, Mr. Butler tabled a Motion to provide that all evidence given before the Select Committee be laid before the House. Technically, this constitutes a report to the House and thus releases the memorandum for publication.

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¹ Parl. Deb., 3rd Series, XXXVIII, cc. 170-198, for which reference we are indebted to the Research Department of the House of Commons Library.

² Parl. Deb. Vol. 606, No. 123, cols. 1183-1184.

We should like to emphasise, however, that this is not regarded by us as a "considerable piece of research," as certain newspapers have described it, but merely as a gathering together of evidence and views on the question of the use of parliamentary committees. This subject was discussed by the Select Committee almost entirely in the context of a Colonial Affairs Committee, and many journals have suggested that it gave inadequate attention to this aspect of procedure. If our memorandum assists further discussion, we may feel that the minor addition to the complexities of Erskine May for which we have been responsible has perhaps been worth while.

The purpose of this memorandum is not to present the Select Committee on Procedure with new proposals, but to argue a case that has been argued many times before. Our justification for doing so is twofold, viz., (1) that the case is still often misunderstood, and (2) that further evidence in its support has been accumulated since it was last presented.

NEED FOR SUPERVISION

We believe that much of the frustration experienced by the back-bencher in the House of Commons, so vigorously expressed in the recent series of letters to *The Times*, is due to the incapacity of the House, as at present organised, to exercise more than a capricious and sporadic supervision of the administrative function. There would appear to be three main reasons for this, viz., (1) that administrative issues, in so far as they are raised through Questions and Debates, inevitably become matters of confidence and are thus drawn into the arena of the party struggle, irrespective of whether they properly belong there or not; (2) that Members, in general, do not have sufficient opportunity to become well informed about such issues, because they are too distant from the administrative process to be adequately acquainted with its problems; (3) that the House of Commons, as a whole, is an entirely unsuitable body for holding a government "responsible" for its actions, except in matters of major importance. The consequence is that administration, although continuously subjected to outside "pressures" of various kinds, operates very largely in the dark as far as parliamentarians and the general public are concerned, and that the ordinary Member is provided with few effective opportunities for exercising what should be one of his more important functions. Hence his entirely justifiable frustration when confronted with the massive strength and instinctive secretiveness of the "bureaucracy."

The seriousness of this situation, now that the responsibilities of the State have become so wide, so detailed, and so inextricably

bound up with the welfare and freedom of every individual, hardly needs stressing. The centre of gravity of our Constitution, it has been said, has moved from Westminster to Whitehall. This, one may readily admit, is a necessary and irreversible change. To attempt to restore the previous balance would involve a reversion to policies incompatible with modern conceptions of welfare and even with national security. But the process of adjustment to new demands must be more than one of passive acceptance; for the democracy in which we place our faith cannot be allowed to degenerate into a system of "bureaucracy-plus-pressures." It will be a bad day when the House of Commons finds itself "reduced to a body which must apply a rubber stamp to a policy or a decision which has been produced by the officials, the experts, and the interested parties, not merely of Whitehall, but also of Transport House, and of the headquarters of such other interests as are concerned in the matter."³ For one of the essential features of our form of democracy is genuine and continuous responsibility of the executive to an elected assembly; and this is precisely what becomes both more difficult and more important as bureaucracy develops in power and scope and organised pressures become more vocal and more insistent.

It therefore follows, in our opinion, that Parliament needs to establish more sensitive and penetrative forms of administrative supervision than it possesses at present. This is essentially a job of organisation. The personnel is already there among its own Members, whose talents are all too frequently underemployed or misemployed, and whose "lay minds" have "a fund of common sense to contribute which is unrealised by the expert, absorbed in his daily routine."⁴ Relieving the frustration of the back-bencher and making officialdom more amenable to democratic—as distinct from merely sectional—pressures are two complementary aspects of the same process.

SELECT COMMITTEES

The method of adjustment which has long been advocated, by people of widely differing political outlooks, is the attachment of select committees, of an investigatory and advisory character, to the departments of government, or to groups of departments. Various proposals to this end were discussed, only to be rejected, by the Select Committees on Procedure of 1912 and 1931–32. Since the latter date, interest in this type of reform has tended to die down. The Select Committee of 1945–46 was predominantly concerned with other matters and, subsequently, there has been very little

³ K. C. Wheare, *Government by Committee*, p. 66.

⁴ Harold J. Laski, *A Grammar of Politics*, p. 352.

discussion of it. Mr. Herbert Morrison, in his *Government and Parliament*, deals with it very summarily and tends to give the impression that the horse is a pretty dead one. This, in our opinion, is unfortunate. We believe that it is now of more importance than ever before, and that the arguments against it are either unsound in themselves or based on a misconception of what is being proposed.

It is with misconceived opposition that we would first like to deal. Much of it is due to the fact that the original "committee proposals," which date back to the first decade of this century, were associated with a view of parliamentary government which most parliamentarians—in our opinion quite rightly—reject. The object of the late Fred Jowett, Member of Parliament for Bradford, who first gave publicity to his "committee" scheme in 1907 and devoted much of his long public life to its popularisation, was not merely to enable Parliament to exercise greater control of administration and to enhance the usefulness of the ordinary Member, but to destroy what he regarded as the "dictatorship" of the Cabinet. To this end he proposed that the committee of M.P.s which he wished to see attached to each department of government should be given not only investigatory and advisory but *executive* responsibilities. The Minister, as committee chairman, would have to win its consent—at least by majority vote—for any action he proposed to take, and would be placed in the position of having to defend, before the House of Commons, committee-decided policies not necessarily approved of by himself or his ministerial colleagues. It hardly needs to be pointed out that this "municipalisation" of parliamentary government would be destructive of governmental coherence, incompatible with the principle of collective responsibility, and inimical to the effective operation of an intelligible two-party system. Jowett thought that these sacrifices were worth laying on the altar of his somewhat primitive view of parliamentary democracy; indeed he saw no virtues at all in Cabinet solidarity and very few in voting along party lines. Few people today, however, are prepared to believe that "municipalisation" would lead to anything but governmental weakness and disorder, in a situation where strength and coherence are vital if the democratic principle itself is to continue to inspire affection and respect. It can therefore be said with confidence that, valuable as the Jowett proposals once were as a means of stimulating interest in parliamentary reform, they are now hardly worth discussing, except as an academic exercise. Although one of us has had several years' experience as a City Councillor and Deputy Chairman of a Council Committee, he has no desire to "municipalise" parliamentary government. On the contrary, his experience has confirmed him in the view that the differences between the procedural requirements

of local and central government respectively are fundamental. The other author of this memorandum has already expressed his objections to the "Jowett Plan" in two articles contributed to the Hansard Society's journal, *Parliamentary Affairs*.⁵

Unfortunately, it is to the dangers and difficulties of the "Jowett Plan" that many people's minds immediately turn when the suggestion is made that Parliament should establish departmental committees of an advisory and investigatory kind. Mr. Morrison himself cannot be absolved from the charge of perpetuating this confusion. Although distinguishing clearly enough between the "Jowett Plan" and the very different proposals made by Mr. Lloyd George to the Select Committee of 1931-32, he directs at both the criticisms that could justifiably be aimed only at the former. It cannot be said of Lloyd George's scheme, nor of Laski's, nor of Ramsay Muir's, that they would inevitably "weaken . . . the powers and authority" of Parliament as a whole or make governments "the victims or creatures of committees." (Nor, we might add, is clear thinking about the subject at all facilitated by Mr. Morrison's suggestion that Lloyd George's advocacy was not disinterested, being inspired by the decline in Liberal fortunes and his own poor prospects of further ministerial office.)

Another, and similar, source of confusion is the fact that the advocates of the advisory and investigatory type of committee have themselves, in certain cases, accompanied their advocacy with other views which are of a kind unlikely to win wide support. Professor Ramsay Muir, for instance, was well known for his dislike of the two-party system and his support for proportional representation. Neither in theory nor in practice, however, is there any necessary association between belief in a more extended committee structure and "unorthodoxy" on the subject of party discipline or of the electoral system. We feel that it is necessary to emphasise this rather obvious point, because we are convinced that the time has come when "committee" proposals should be considered strictly on their merits, and that this will not be possible unless they are clearly dissociated from the other wider and less generally acceptable proposals for political reform with which they have become fortuitously linked. To make this doubly clear, we would like to state that we do not favour proportional representation, coalition governments, minority governments, or weak Cabinets.

A further objection to the establishment of a "committee system" is based on the record of committees in the American Congress and

⁵ *The Labour Party and House of Commons Reform*, Vol. X, No. 4, Autumn, 1957, and Vol. XI, No. 1, Winter, 1957-58.

the French Chamber of Deputies. Here, again, Mr. Herbert Morrison expresses a widely held point of view. "American Secretaries of Departments," he writes, "may be summoned to give evidence and to be examined by committees of the Senate or of the House of Representatives . . . , and in France the parliamentary committees have considerable powers over French Ministers. The result may indeed be fatal for the Minister, or what the United States calls the Official, concerned. In the United States the President's nominees for his Secretaries of Departments, Ambassadors, and even delegates to the United Nations Assembly, are subject to approval by a two-thirds majority of the Senate and can be summoned before Senate committees and severely examined not only on their policies and capacities, but also on their past lives. Budgets and legislation are exhaustively examined in committees of the U.S. Congress and the French Parliament, which would often appear to have even more decisive powers and influence than the parliamentary institution as a whole. . . . Our own Parliament has not gone in for these procedures. I feel sure that it would regard the practice as a derogation of parliamentary authority."⁶

We cannot take this argument very seriously. In the first place the advisory committees which we propose will be very different in powers and composition from the committees of the American Congress and the French Chamber of Deputies. Secondly, and more importantly, we see no reason to suppose that an institution which has certain effects in a given constitutional and political context will have similar effects in a totally different one. In France the *de jure* and *de facto* powers wielded by the committees are primarily the product of a political set-up characterised by an incoherent party system and weak, short-lived governments. In America, the committee has acquired what, from a British point of view, is a totally excessive authority because the principle of the separation of powers has divorced the executive from the legislature. In Britain, neither of these circumstances is present. We have a stable two-party system, powerful and durable governments, and a responsible executive. Our problems, therefore, are totally different from those of France or the U.S.A. Both of these countries are trying to give greater coherence to a system where power is divided and responsibility diffused. We, on the other hand, are attempting—or should be attempting—to loosen the excessive rigidities of a system where government authority is highly concentrated and where the responsibility of the executive to the legislature tends to be more formal than real. No one wants Britain to have weak and unstable governments,

⁶ Herbert Morrison, *Government and Parliament*, 1954, pp. 155–156.

but no one can seriously argue that there is any real danger of this. On the contrary, the danger here is that the balance of power is becoming too heavily weighted on the side of the executive, to the detriment of the legislature's efficient performance of its proper democratic functions. As Professor Brogan has said:

"We do not need the American or French committee system to remedy a defect from which our system does not suffer, but to remedy a defect from which it does suffer—too complete control of the time of the House and of the processes of legislation by the Cabinet. As long as Cabinet control remains firmly based on rigid party discipline, only the most outrageous committee sabotage would interfere seriously with the Government programme—and that could be remedied by calling in the docile majority without which, committees or no committees, Cabinet Government will break down."⁷

How unreal these fears are becomes even clearer when the *functions* we propose for our advisory committees are set down. For a general statement of what the committees would do and how they should behave, we feel that we cannot improve on the following passage from the late Harold J. Laski's *A Grammar of Politics*, first published as long ago as 1925:

"They would work not as the makers of policy, which is primarily . . . a ministerial function, but in part as a consultative organ, and in part as a means of bringing to the legislature a definitely competent opinion upon the working of the administrative process. They ought to have access to all papers save those of an especially confidential kind. They should have the power to initiate inquiries in the departments. They should be able to summon public servants before them for the taking of evidence upon particular questions. They should have regular meetings with the minister at which his policy, and especially his legislation, is freely discussed and explained. To them should be submitted those ordinances which every executive is compelled to issue out of its discretion and without immediate legislative sanction. Their function, I would emphasise, would give them no specific duties to the legislature, unless it was deemed desirable to make their approval necessary . . . before the issue of . . . delegated legislation. They could, otherwise, report disagreement with the executive only through the ordinary channels of debate. They would have no power to prevent the introduction of legislation, and no authority to dictate ministerial methods. Their business, like that of the King of England, would be to advise, to encourage, and to warn, with the addition that, in the process, they would also learn."⁸

⁷ In Campion and others, *Parliament, a Survey*, p. 84.

⁸ pp. 349–350.

These proposals were repeated by their author, without substantial modification, in his *Parliamentary Government in England*,⁹ and in his *Reflections on the Constitution*.¹⁰ More recently, they have received support, in general terms, from authorities such as Lord Salter and Mr. G. M. Young, whose political views could hardly be more different from those of Professor Laski.¹¹ More generally approved of than the alternative suggestions advanced by Professor Ramsay Muir, they are also, in our opinion, more practicable and more in line with the essential characteristics of British parliamentary government. Professor Muir's scheme for six committees (one for each group of spending departments), each presided over by a "super-minister" with powers of withdrawing questions of "policy" from the committee's cognisance, would involve (a) a reorganisation of the Cabinet which recent experience can hardly be said to prove obviously desirable, and (b) a distinction between policy and administration which would be difficult to maintain and fruitful with controversy. His proposal that these committees should receive the Estimates and report to the House of Commons "when the time came to consider these Estimates" is also one that we cannot commend, as it assumes (a) that the committees could perform this work completely—which is disapproved by the inter-war experience of the Select Committee on Estimates—and (b) that the whole character of the debates in Committee of Supply should be fundamentally changed.¹² As we have said, our aim is to introduce a system of advisory committees which will help Parliament perform its duties, not to transform the whole character of parliamentary government itself. For this purpose, it seems to us that the "Laski" type of committee is much preferable to the "Muir" type.

Clearly, however, it is not sufficient to make recommendations in broad and general terms. Details of committee structure, procedure and terms of reference ought to be suggested, however tentatively. In respect of these matters we should like to amplify some of the "Laski" proposals and to modify others.

⁹ See pp. 211–212.

¹⁰ See pp. 52–53.

¹¹ In Campion and others, *op. cit.*

¹² As is well known, Supply Debates are about policy, not about finance. Muir and others have from time to time suggested that they *should* be about finance, but no one has yet proposed any practicable method of giving effect to this. Even if a body of over 600 Members were capable of treating the Estimates *qua* Estimates, there would be justifiable objection to reducing the opportunities provided by the 26 Supply days for attacking the Government politically. Moreover, all attempts to use the Select Committee on Estimates as a means of "briefing" Members for Supply Debates have completely failed. On the latter point, see A. H. Hanson, "The Select Committee on Estimates," in *Yorkshire Bulletin of Social and Economic Research*, Vol. III, No. 2, July, 1951, pp. 103–104.

A major question is the number of committees and their size. Laski's suggestion is "one for each Department." Reasonable when it was made, this would seem to be less reasonable today. The number of departments has greatly increased since the 1920s and the functions of government have become increasingly integrated and *interdepartmental*. Some grouping of departments, for purposes of advisory committee work, would therefore appear to be indicated. There are, however, very serious difficulties in devising any "group" scheme. One is that a logical arrangement of governmental functions, such as that suggested by the 1918 Committee on the Machinery of Government, immediately reveals the impossibility of assigning a given department—with a few doubtful exceptions—to any one functional group.¹³ Another is that such groups vary so much in size that some committees might have very little to do, while others would be overwhelmed by the extent of their responsibilities. As this ought to be avoided, and as a situation in which two or more committees are concerned with one department would result in insufferable complexities, the "logic" of functionalism will have to be sacrificed to the demands of convenience. No committee could be given responsibility for a *function* of government, desirable as this might be on grounds of coherence. Some, however, might cover the affairs of a number of closely related *departments*. A Defence Committee, for instance, might take the Ministry of Defence, the Admiralty, the War Office, the Air Ministry and the Ministry of Supply as its "parish." An External Affairs Committee might cover the Foreign Office, the Office of Commonwealth Relations, the Colonial Office and the British Council. A Production Committee might—although this is more doubtful—deal with the affairs of the Board of Trade, the Ministry of Agriculture, Fisheries and Food, and the Ministry of Power. The Ministry of Works and the Post Office might conceivably be brought together under a committee which would be rather difficult to name. But there are many departments which would require committees to themselves, *e.g.*, Transport, Health, Housing and Local Government, Pensions and National Insurance, Labour, and the Home Office.

Even so, it would be impossible to ensure that all committees had approximately equal amounts of business to transact. Much would depend on the degree of parliamentary interest in a given department or group of departments and the amount of time that individual committee members were prepared to devote to the work. Such imponderables can hardly be provided for in advance. But some

¹³ See Professor W. A. Mackenzie, "The Structure of Central Administration," in Campion and others, *British Government since 1918*.

attempt could be made to relate the size of the committee to the scope of its responsibilities. A committee attached to a single department would probably require, in most cases, a membership of no more than fifteen; whereas a committee with a group of departments under its care would need a much larger membership, as it would have to divide itself into sub-committees for purposes of investigation. Our suggested External Affairs Committee, for instance, would obviously require a fairly extensive sub-committee structure if it was to cope adequately with its responsibilities.

In view of the fact that *functions* overlap departmental border-lines, it would probably be desirable to provide for periodical meetings of committee chairmen, where they might discuss common problems and try to ensure that duplication was kept to the minimum.

Experience suggests that terms of reference should be short and vague; for it is almost impossible to define in advance the scope of an advisory committee's activities. We would emphasise, however, that there should be a clear understanding, from the beginning, that the function of the committee is essentially to help the Minister and his officials to give satisfaction to the public, not to engage in a kind of institutionalised cowboys-and-indians game. This would seem to demand that, except in respect of specific matters on which the committee might be required to present formal reports to the House, its relationship with the Minister should be a confidential one. The development of friendly and co-operative relations between committees and Ministers is essential, in our view, to the success of the scheme, and this cannot take place if the Minister is constantly under the threat of having his sins of omission and commission made the subject of a report to the legislature.

Primarily, the Committee will be concerned with the day-to-day running of the department; but, as we have already suggested, it would be a mistake to attempt to exclude it from considering questions of "policy." Policy and administration overlap, and to try to erect a wall between the two is asking for trouble. "Political" questions, in the party sense, would, of course, rarely engage the committee's attention. These are already sufficiently ventilated on the floor of the House, and the committee would soon realise that if it divided along party lines to present the Minister with majority advice on such questions, it would be achieving precisely nothing; for he would be quite justified in refusing to take any notice at all of recommendations which were not either nearly unanimous or passed by a vote in which members of the majority party were to be found on both sides. With this reservation, no harm could come—and much good might come—of permitting the committee to consider policy matters. Indeed, it is almost impossible to *prevent* an advisory committee from

considering them, however strictly its terms of reference may be drawn up. "No power on earth," said Mr. Osbert Peake to the Select Committee on Procedure of 1945-46, "can stop a Select Committee of the House of Commons from going beyond its terms of reference."¹⁴

In spite of the "consistent with the policy implied" phrase in the Estimates Committee's terms, this body, as one of us has illustrated in a study of its reports, has consistently made recommendations with the strongest "policy" implications.¹⁵ Yet no one, as far as we are aware, has seriously suggested that it should be stopped from doing so, on the grounds that this is an invasion of ministerial responsibility—even though, in this case, the Committee reports publicly to the House and not confidentially to the Minister. On the contrary, since 1946 the work of this Committee has been regarded as of very great value.

We would go even further, and suggest that certain of our committees would be concerned far more with "policy" questions than with administrative ones. This would be the case, for instance, with an External Affairs Committee. The objections to according it such freedom spring readily to mind, but we feel that they are quite conclusively answered by Professor Laski in the passage he devotes to them in *Reflections on the Constitution*.¹⁶

Probably the best plan is to leave the Committee's area of operations to be mapped out by experiment and the development of conventions, as is being attempted with the present Select Committee on Nationalised Industries (Reports and Accounts). Ministers, it is to be hoped, would acquire the habit of seeking committee advice when about to initiate a new departure in policy or to put into operation some plan of departmental reorganisation. Committees, for their part, would regard themselves—and be regarded by the Minister—as free to give their advice, unasked, on matters which they had chosen to investigate. But there may be a case for specifying certain occasions on which the Minister would be *bound* to consult

¹⁴ H.C. 189-I of 1945-46, Minutes of Evidence, Q.4091.

¹⁵ See A. H. Hanson, *The Select Committee on Estimates*, *loc. cit.* pp. 113-115.

¹⁶ See pp. 87-89. In general, we agree with Dr. Basil Chubb, who, in answering the argument that "Question Time and a short, sharp vigorous debate on the Adjournment Motion are superior methods of investigating governmental action," writes:

"That is to say, in effect, that Ministers must answer to the House of Commons in the House of Commons and by its procedure, however inadequate, but not before select committees and by more efficient processes. It is to say that governments must answer questions and meet criticisms based on information acquired in a haphazard fashion, but that Parliament ought not to possess a competent and thorough method of asking questions and satisfying itself. To argue thus is to make a mockery of responsible government" (*The Control of Public Expenditure*, p. 249).

the committee before taking action. For instance, it might be advisable to insist that the Committee's opinion should be asked on proposals for new legislation, when these have reached the stage of a draft bill, and on proposed statutory instruments.

We have emphasised the desirability of informality in the Minister-committee relationship. This, of course, excludes having the Minister as chairman of the committee, as certain advocates of the committee device have proposed. It is also incompatible, in our view, with any attempt on the committee's part to summon the Minister for examination—in other words, to have him on the mat. Ministers are already overwhelmed with work, and committees cannot expect to have them at their beck and call. Most committee inquiries, we consider, should be conducted in the normal "select Committee" manner—by examining official witnesses and asking for memoranda. (We think that there should be a right of access to files, except highly confidential ones, but that this should be used sparingly and principally as a "last resort" measure.) If there is disagreement between Minister and committee on a matter of major importance, the Minister, no doubt, would wish to appear before the committee to give explanations and to argue his case. It might also be desirable to have an arrangement whereby the Minister met the committee for general discussion at stated intervals. For purposes of more continuous liaison with the committee, the Minister might well use the services of his Parliamentary Secretary, or even of his Parliamentary Private Secretary.

In his *Reflections on the Constitution*, Professor Laski expressed the opinion that the Minister should have an "invariable right" to control the committee's agenda.¹⁷ This is a suggestion which, as far as we are aware, he never made on any previous occasion. Nor does he attempt to amplify or justify it. We confess that we can see no point in giving the Minister this right, which might well arouse the resentment of the committee's members. If advisory bodies such as the National Health Services Advisory Council, the two Central Advisory Councils for Education, or the Advisory Council on Child Care have power to discuss such matters, within their terms of reference, as they think fit, surely it is even more appropriate that a committee consisting of Members of the House should possess this power. It may be, however, that Professor Laski was thinking of those matters which the committee discusses with the Minister, and in his presence. If so, the suggestion has much to commend it, for we think that the Minister ought to possess the right to decline to discuss with his Committee any questions on which, for one reason

¹⁷ p. 53.

or another, he is not prepared to express an opinion at a particular time.

RELATION TO OTHER COMMITTEES

An important question is the extent to which these proposed advisory committees should replace the existing, specialised sessionally-appointed select committees—the Public Accounts Committee, the Select Committee on Estimates, the Select Committee on Statutory Instruments and the Select Committee on Nationalised Industries (Reports and Accounts).

Only one of these, the Public Accounts Committee, would present no problem in the new set-up. This long-established and highly respected body has a specialised function which no departmental advisory committee could discharge with equal efficiency. Moreover, such a committee would find the examination of accounts a considerable nuisance, as a duty of this kind would be related only very remotely to its main interests. The other Select Committees, however, perform functions very closely allied to those proposed for the advisory committees, and there would seem to be a danger that the Estimates Committee, in particular, would be conducting the same kinds of investigation that the new bodies were set up to conduct. It can be argued, moreover, that the duties of the Estimates Committee could be better performed if distributed among a number of departmental committees, in so far as (a) the fiction of “considering estimates” could be dispensed with and (b) the advantages of specialisation and continuity of experience could be realised. But any proposal to abolish the Estimates Committee, if and when the new scheme comes into operation, encounters two difficulties, *viz.* (1) that the Estimates Committee does not—at least in theory—advise the Minister, but reports to the House, and (2) that it is able to deal with subjects, such as Treasury Control, Civil Service Organisation, “O. and M.,” etc., which are of common interest to *all* departments. It may be that the second of these difficulties could be overcome by appointing a Committee to examine precisely questions of this type, and no others; and that the first might be dealt with by giving the new departmental advisory committee the dual function of advising the Minister and of reporting to the House on matters similar to those on which the Estimates Committee at present reports. But we feel that this might be a clumsy arrangement, and that if the advisory committee attempted to combine giving advice to the Minister and reporting to the House on his administration the development of that spirit of mutual confidence between Minister and committee, which we regard as essential to the proper functioning of the committee system, might be inhibited. We also feel that something is

gained by the application of fresh and uncommitted minds to administrative problems, which characterises the Estimates Committee's work. On balance, therefore, we should be in favour of preserving the Estimates Committee, with unchanged terms of reference. It would be necessary, however, to provide for close liaison between the Estimates Committee and the departmental committees, which would be in an excellent position for identifying problems worthy of Estimates Committee investigation. The Estimates Committee might thus take some of the load off their shoulders, and might function even more effectively than at present, in so far as its selection of areas of inquiry might be more purposive and less haphazard.

As for the Select Committee on Statutory Instruments, the problem here is less serious than it at first appears to be. All advocates of advisory committees have suggested—and we think rightly—that one of their functions should be the examination of statutory instruments; nevertheless, there would seem to be a clear distinction between their duties in this respect and those of the present Scrutinising Committee. The latter body examines Statutory Instruments *after* they have been made and laid before the House, in order to identify those which seem to present a *prima facie* case for annulment, on the grounds that there has been some irregularity in their making or laying. (“Unusual or unexpected use,” admittedly, would enable the Committee to consider the “merits” of a Statutory Instrument, but in practice it has interpreted this clause in its terms of reference very restrictively.) With the help of the Counsel to Mr. Speaker it performs this modest but necessary task to the general satisfaction, and there is every reason to allow it to continue to do so undisturbed. The advisory committees would not do this so well, as the somewhat legalistic matters on which the Scrutinising Committee discusses would engage neither their interests nor their abilities. What, on the other hand, they would be well equipped to undertake is the examination of Statutory Instruments before issue and before laying, from the very standpoint that the Scrutinising Committee has sometimes been criticised for disregarding—that of “merits.” There would be no element of “control” here—for a Minister would be entirely free to disregard the committee's opinion that a proposed Statutory Instrument was inherently unwise or defective as an expression of the policy it purported to embody; but at least the Minister would have enjoyed the advantage of “trying it out on the dog” and might be persuaded, in time, to profit by the advice he received.

The Select Committee on Nationalised Industries performs functions very closely allied with those that would engage the attention

of the advisory committees attached to the Ministry of Power and the Ministry of Transport. If it was maintained in existence, it would need to liaise very closely with these committees, perhaps through overlapping membership and the sharing of the services of the same House of Commons Clerks. Alternatively, its functions could be discharged by sub-committees of the two advisory committees. We refrain from elaborating these suggestions as it is not yet certain whether the Select Committee on Nationalised Industries is going to be a permanent feature of the parliamentary landscape.

GRIEVANCES

How far, if at all, should these committees concern themselves with grievances against the administration felt and expressed by individuals and groups? In the sense that an advisory committee helps to improve the quality of administration, in such a way as to make it more acceptable to the public, the "removal of grievances" is one of its inescapable duties. But this is not to say that it should open its doors—or its letter-box—to the complaints of people who consider that the administration has shown them scant consideration. There is everything to recommend the present procedure whereby an aggrieved citizen or body of citizens, having failed to obtain satisfaction from the administrative agency concerned, makes contact with the M.P. for the constituency or some other Member whose interest is likely to be aroused. The Member can then make representations to the appropriate Minister and—if he thinks the issue sufficiently important—table a Question. Nothing should be allowed to impede or divert the free flow of representations from citizens to Members and from Members to Ministers; and if the Committee attempted to function as a grievance-collector and grievance-investigator on its own account, it would soon become unpopular with Members and degenerate into something very different from what we conceive it ought to be. This does not mean, however, that it should entirely eschew the investigation of grievances—for an advisory committee, if it is to do its job properly, ought to be fully informed of public attitudes to the department to which it is attached and prepared to inquire into causes of dissatisfaction. This can best be provided for, without any short-circuiting of the normal procedures, if M.P.s, whether members of a particular committee or not, are prepared to make use of its services when they feel that these can be of value. It would be open to any Member who had failed, through informal communication with the Minister concerned, to obtain the assurances he wanted, to refer the matter to the Committee, as an alternative to asking a Question. The

Committee would then decide whether there was a *prima facie* case for an inquiry, and inform the Member accordingly. If an inquiry was held, the Member should be acquainted with its results, but while it was being conducted he should regard himself as bound in honour not to table a Question on the matter or to raise it via the half-hour adjournment. In other words, the Member would now have two different avenues of approach to the Minister, one direct and the other through the Committee. They might be used successively but not simultaneously, and the use of the second would temporarily bar the tabling of a Question or an Adjournment Motion. It may be that, in this way, greater satisfaction would be obtained and some saving of the House's time achieved.

COMPOSITION AND SELECTION

Finally, a word on the composition and selection of the Committees. It seems to us that in these matters the familiar is quite satisfactory. They should be chosen by the Committee of Selection, should consist of back-benchers, and should reflect, as accurately as possible, the balance of Party strength in the House. Chairmen should preferably be experienced back-benchers, and committee members should obviously be selected for their knowledge of and/or interest in the department or departments concerned. There would, in our view, be little advantage in insisting that Committee Chairmen should be members of the Opposition.

All the above suggestions are necessarily tentative, as most of our knowledge of parliamentary procedure comes from reading and reflection. We do not even claim, as spectators, to see most of the game, and it would not take an old parliamentary hand to discover that we are wanting in knowledge of some of the practical details of the House's *modus operandi*. We believe, however, that the student of politics has something to contribute to the type of discussion in which the Select Committee on Procedure is engaged, in so far as he has more time for reflection and better opportunities for comparison than those involved in the activities of the House, and we are fortified by the view expressed by Lord Campion, perhaps the greatest living authority on the House of Commons, to the effect that "it does not seem beyond the wit of man to devise a committee system which, while retaining the essentially subordinate and advisory character of committees, might make the House of Commons more generally capable of informed criticism."¹⁸

¹⁸ Campion and others, *Parliament, a Survey*, p. 34.

THE CONSTITUTION OF THE WEST INDIES

J. C. McPETRIE

1. SOURCE OF THE CONSTITUTION

THE West Indies (Federation) Order in Council, 1957,¹ was made under section 1 of the British Caribbean Federation Act, 1956,² and follows the convenient plan that was adopted for Rhodesia and Nyasaland³: a short Order in Council containing provisions which would not aptly appear in the Federal Constitution itself and an Annex in which the Federal Constitution is set out. In this paper the Annex is referred to as "the Constitution" and "the Order in Council" means the Order in Council to which the Constitution is annexed.

The Order in Council provides for bringing the Constitution into force⁴ and for a number of transitional and consequential matters. Section 2 is of some constitutional interest. In order that, so far as was necessary, the government of the Federation could be carried on between the date when the initial parts of the Constitution came into force and the date when the House of Representatives first met, section 2 gave the Governor-General during that period special authority to legislate by regulation, to exercise executive authority without ministerial advice, and to appropriate funds. Royal Instructions of August 20, 1957, however, directed the Governor-General to consult, so far as practicable, with the Standing Federation Committee⁵ in exercising these special interim powers.

2. GENERAL OUTLINE OF THE CONSTITUTION

The Federation comprises the following ten colonies and their dependencies:

Antigua, Barbados, Dominica, Grenada, Jamaica, Montserrat, Saint Christopher Nevis and Anguilla, Saint Lucia, Saint Vincent and Trinidad and Tobago.

* This article was originally presented as a paper at the 1958 Cambridge Colloquium on Comparative Law.

¹ S.I. 1957 No. 1364.

² c. 63.

³ Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953 (S.I. 1953 No. 1199).

⁴ The initial parts were brought into force by Order in Council on January 3, 1958.

⁵ The Standing Federation Committee was a committee representative of the legislatures of the federating territories and was appointed by the London conference of 1956 to work out the final details of the Constitution.

As in the Constitution, these colonies are referred to in this paper as "Territories." With two exceptions the dependencies of a Territory are treated in the Constitution as part and parcel of the Territory to which they belong. The exceptions are the Turks and Caicos Islands and the Cayman Islands, which are dependencies of Jamaica.⁶ Though they have no representatives of their own in either chamber of the Federal Legislature, they are for some purposes treated by the Constitution in the same way as constituent Territories—see the definition of "Territory" in article 116 (1).

The detailed plan for the Constitution was drawn up by representatives of the Territories in a series of conferences from 1948 to 1956 and the evolution of the plan can be followed by study of the published reports of these conferences.⁷

In its general conception the Constitution resembles that of the Australian Commonwealth rather than any of the other more notable federal constitutions. In particular, division of powers follows the Australian pattern whereby certain matters are within the exclusive authority of the centre, certain matters are concurrent with central authority prevailing and all other matters are within the exclusive authority of the Territories.

The fact that the West Indies have not yet attained independence is reflected in the Constitution. In particular (i) the Parliament of the United Kingdom has unrestricted power to legislate for the Federation since it did not divest itself of that power in the parent Act of 1956; (ii) such authority as the Federal Government has in external affairs it possesses only by delegation from the United Kingdom⁸; (iii) the Governor-General has certain powers which he may exercise without ministerial advice; (iv) Her Majesty has certain powers to legislate for the Federation by Order in Council⁹ and to disallow Federal laws.¹⁰

⁶ When this paper was written the position was that the Turks and Caicos Islands were in fact technically part of Jamaica by virtue of an Order in Council of August 4, 1873 (S.I. Rev. XI, p. 107), and the Cayman Islands, though not part of Jamaica, were under the authority of Jamaica by virtue of the Cayman Islands Act, 1863. But, by virtue of the Cayman Islands and Turks and Caicos Islands Act, 1958 (c. 63), on July 4, 1959, the Turks and Caicos Islands ceased to be part of Jamaica, the Cayman Islands Act, 1863, ceased to have effect, the constituent power in respect of both groups of islands became vested in Her Majesty in Council and new constitutions were conferred on each group by Order in Council—Cayman Islands (Constitution) Order in Council, 1959 (S.I. 1959 No. 863) and Turks and Caicos Islands (Constitution) Order in Council, 1959 (S.I. 1959 No. 864).

⁷ Report of British Caribbean Standing Closer Association Committee, 1948–49 (Col. No. 255). Report by the Conference on West Indian Federation, 1953 (Cmd. 8837). Plan for a British Caribbean Federation, 1953 (Cmd. 8895). Report by the Conference on British Caribbean Federation, 1956 (Cmd. 9733).

⁸ Article 56 (1).

⁹ Article 53.

¹⁰ Article 52.

The organs of government established by the Constitution are a bicameral legislature consisting of an appointed Senate and an elected House of Representatives; a body of Ministers styled the Council of State; a Federal Supreme Court which is essentially a court of appeal but also has a limited original jurisdiction; and a non-political Public Service Commission.

The Constitution is amendable by Order of Her Majesty in Council¹¹ which is the only amending process authorised by the Act.¹²

3. THE SENATE

The Senate consists of nineteen Senators—one for Montserrat and two for each of the other Territories.¹³ It appears that, as one of its functions, the Senate is intended to represent the interests of the Territories as equal partners in the Federation.¹⁴ Such an intention, of course, failed in Australia, where Senators are elected and the Senate has operated on federal party political lines. It is too early to say what will happen in the West Indies. The way is certainly open for Senators to be appointed as representatives of individual Territories rather than as adherents of a particular Federal political party for in appointing a Senator for a Territory the Governor-General (whose ultimate choice is not fettered by the letter of the Constitution or, as yet, by convention) is obliged to consult the Governor of the Territory and the latter, before suggesting names to the Governor-General, is obliged by article 116 (10) to consult the Executive Council of the Territory, which will be composed mainly of members of the party in office in the Territory. On the other hand, there are two factors which could tend to produce a Senate constituted on party political lines. In the first place, the members of the Territorial Executive Council concerned, if politically associated with one of the parties represented in the Federal House of Representatives, might regard themselves as primarily concerned to secure the appointment of persons who would support that party in the Federal Legislature. Secondly, at least three of the Federal Ministers must be chosen from the Senate¹⁵ so the Governor-General, in appointing Senators, will as a matter of practical politics be obliged to secure, so far as he can, that the Senate at any time contains a sufficient number of persons politically acceptable to the

¹¹ Article 117.

¹² s. 1 (2) (e) and (3).

¹³ Article 8.

¹⁴ See, too, articles 9 (c) and 12 (3) of the Constitution and para. 54 of the Report of the British Caribbean Standing Closer Association Committee, 1948-49, Col. No. 255.

¹⁵ Article 63.

Prime Minister of the day and also, since a Senator's five-year period of office is not affected by a dissolution of the legislature, a sufficient number of persons who would be acceptable to a new Prime Minister in the event of a change of government. Both these factors appear to have operated in the appointment of the first Senate.¹⁶ But they do not appear to have operated to the exclusion of all other considerations, for the Senate as finally constituted contains a number of persons who in the past have played an important part in public life in their respective Territories without being identified, or primarily identified, with particular political parties.

A dissolution of the legislature (which causes all seats in the House of Representatives to become vacant) does not affect the life of the Senate, but all seats in the Senate become vacant every five years.¹⁷ The first reconstitution of the Senate will thus coincide with the next general election to the House of Representatives only if the present House of Representatives lasts its full five-year term. If that does not happen the two processes will get out of step with one another and will so continue until chance brings them into step once more or until the Prime Minister purposely advises a dissolution of the legislature to coincide with the end of a five-year life of a Senate.

4. THE HOUSE OF REPRESENTATIVES

The House of Representatives consists of forty-five members distributed among the Territories as follows: Jamaica seventeen, Trinidad and Tobago ten, Barbados five, Montserrat one¹⁸ and the remaining territories two.¹⁹

The Federal electoral law is to be enacted by the Federal Legislature, except that the delimitation of Federal constituencies within a Territory is left to the legislature of the Territory.²⁰

As in, for example, Australia and Canada, it is not permissible for a person to be concurrently a member of the Federal Legislature and of a Territorial Legislature. This is not achieved, as it is in Australia and Canada, by disqualifying a member of a Territorial Legislature for appointment or election to the Federal Legislature,

¹⁶ See the article on p. 4 of *The Times*, "British Colonies Review" for the second quarter of 1958.

¹⁷ Article 12 (1). Cf. Canada (where a Senator holds his seat for life), the Union of South Africa (where a Senator vacates his seat on a dissolution of the Senate, by effluxion of time or on a change of government) and Australia (where a Senator vacates his seat upon a dissolution or by effluxion of time—half retiring after three years and half after six).

¹⁸ Montserrat also has an alternate member entitled to participate in the proceedings in the absence of the substantive member (article 16).

¹⁹ Article 15.

²⁰ Article 19. Similar provision was made by s. 29 of the Australian Constitution but only as a temporary and transitional measure.

but by providing²¹ that if a member of a Territorial Legislature is appointed or elected to the Federal Legislature his appointment or election shall cease to have effect unless within twenty-one days he terminates his membership of the Territorial Legislature. This enables a person to retain his position in Territorial politics until he is certain that he has secured a seat in the Federal Legislature and seems a sensible enough arrangement where no less than fourteen legislative chambers have to be manned from a population of approximately 3,000,000.

In Australia not only is such a dispensation not granted by the Federal electoral law but that law expressly prevents such a dispensation from being granted indirectly by State law, for it disqualifies for membership of the Commonwealth Parliament any person who has resigned from a State Parliament and has the right under the law of the state, if not elected to the Commonwealth Parliament, to be re-elected to the State Parliament without the holding of a poll.

The Speaker of the House of Representatives may be elected from either within or without the House.²²

5. LEGISLATIVE POWERS

General

The legislative power conferred on the Federal Legislature by article 43 (1) and (2) is, like the power conferred on the Parliament of the Commonwealth by section 51 of the Australian Constitution, a power to make laws "for the peace, order and good government of the Federation with respect to" a number of matters enumerated in the Exclusive Legislative List and the Concurrent Legislative List; and no doubt problems of *vires* will arise in the form of the question whether a particular law is or is not a law "with respect to" one of these matters.²³ The wording of the second half of article 43 (1), however, which confers incidental powers is not precisely the same as that of placitum (XXXIX) of section 51 of the Australian

²¹ Articles 11 and 22.

²² Article 24 (2). Clearly in a chamber of 45 members the election of a member to the chair is a much greater loss to his party than it is in a much larger chamber like the House of Commons, and the first Speaker was in fact elected from outside. Under the Constitution of the Federation of Rhodesia and Nyasaland it is also possible for the Speaker to be elected from outside the House; but there is less inducement there to have recourse to an outside Speaker, for if a member of the House is elected he vacates his constituency seat and his party can therefore hope to win the seat again in the ensuing by-election (article 16 (2) of that constitution).

²³ Problems such as these have of course engaged the courts in Australia, where various tests have from time to time been applied to solve them. The Australian decisions seem to show that no single formula can solve this problem of characterisation.

Constitution, which confers authority to legislate on matters incidental to "the execution" of powers vested in the Commonwealth Parliament, Government, Judicature, etc.²⁴ Article 43 (2) prohibits a Territorial Legislature from legislating on any matter in the Exclusive Legislative List. But the proviso stipulates that this prohibition will not be effective as regards any particular matter until such date as the Governor-General may appoint—a transitional provision which is also found in the Constitution of the Federation of Rhodesia and Nyasaland and is obviously inserted for reasons of practical convenience.

Concurrent legislative powers of a Territorial Legislature

A Territorial Legislature as well as the Federal Legislature may legislate on matters in the Concurrent Legislative List²⁵ but in case of inconsistency Federal law prevails over Territorial law.²⁶ The Constitution rests content with the statement that the Federal law "shall, to the extent of the inconsistency, prevail over the Federal law," which would appear to be all that it is necessary to say. Section 109 of the Australian Constitution, on the other hand, goes on to say further that the State law shall, to the extent of the inconsistency, "be invalid."²⁷

Delegation of legislative authority

Article 44 confers on both the Federal Legislature and a Territorial Legislature unrestricted power to delegate to the other authority to legislate upon any matter that is, under the Constitution, within the exclusive legislative power of the delegating legislature. Such a delegation may be revoked by the delegating legislature, but while it is in force the matters to which the delegated authority extends are, as respects the Territory in question, deemed to be included in the Concurrent Legislative List. Express provision of this kind is of course made in other constitutions but, so far as is known to the writer, not in such wide terms.²⁸

²⁴ The Privy Council in *Att.-Gen. for the Commonwealth v. Colonial Sugar Refining Co., Ltd.* [1914] A.C. 237 held that in Australia there must be a particular legislative power actually in exercise as a peg on which to hang an incidental law.

²⁵ Article 43 (3).

²⁶ Article 45 (1).

²⁷ "Invalid" in this context, however, has been held merely to mean inoperative and if the Commonwealth law were repealed the State law would revive (*Carter v. Egg and Egg Pulp Marketing Board* (1942) 66 C.L.R. 557).

²⁸ In Australia the power of delegation is possessed only by the State legislatures (s. 51, *placitum* (XXXVII); and although article 32 of the Constitution of the Federation of Rhodesia and Nyasaland provides for delegation in both directions the power of delegation conferred upon Territorial legislatures is restricted to certain purposes.

Legislation to implement international obligations

Article 17 (1) provides that for the purpose of implementing international obligations the Federal Legislature may make laws with respect to any matter even though the matter is one which is otherwise within the exclusive authority of Territorial Legislatures. The absence of such a power from the Australian Constitution has given rise to argument about the extent of the Commonwealth power to legislate for the implementation of international agreements.²⁹ While the West Indian Federation is a dependent territory and the United Kingdom remains responsible for its external affairs, Parliament will, of course, be able to legislate for the implementation of the Federation's international obligations; but when the Federation obtains independence article 47 (1) will assume correspondingly greater significance.

Emergency legislation

Article 48 anticipates the need of the Federal and of a Territorial Government for special powers to deal with emergencies. Paragraph (4) makes it clear that in this context the term "emergency" is not restricted to states of war or threatened war, which, indeed, one would generally expect to be dealt with by an exercise of the defence power. Under paragraph (1) the Federal Legislature and a Territorial Legislature each has power for emergency purposes to trench on the field of the other; but any exercise of this power will be effective only during a period of emergency. In order that a Territorial emergency law shall not be frustrated by an ordinary Federal law paragraph (3) of article 48 provides that, except to the extent that the Governor-General otherwise directs, a Territorial emergency law shall in case of inconsistency override an ordinary Federal law. No special provision is made as regards inconsistency between a Federal emergency law and a Territorial emergency law and consequently by virtue of article 45 (1) the Federal emergency law would prevail.³⁰

²⁹ The cases are examined in Chap. X of *The Australian Constitution* by H. S. Nicholas (The Law Book Company of Australasia Pty., Ltd., 1952). The position appears to be that, though some judges have expressed the view that by virtue of s. 51, placitum (XXIX), the Commonwealth Parliament may make laws for this purpose which extend to State matters, the full scope of this power is still uncertain.

³⁰ There are no provisions in the constitutions of Canada and Australia corresponding to article 48. In Canada, so far as the Central Government is concerned, the same need does not arise in view of the wording of s. 91 of the British North America Act, 1867 (see reference *Re Wartime Leasehold Regulations* [1950] S.C.R. 124). In Australia, if the Commonwealth wished to take special powers for emergency purposes within the State field they would have to be such as could be regarded as aspects of the defence power. The Constitution of India, however, contains in article 250 provisions very similar to those of the West Indies, except that the special powers are conferred on the Central Legislature only and not on the State Legislatures.

Provision for controlling the movement of persons between Territories

It would appear to be in keeping with the political aims underlying federation that there should be freedom of movement for persons within the Federal frontiers, and that such restrictions as are imposed should be imposed by Federal law in the general interests of the Federation as a whole. This is one of the fundamental freedoms guaranteed by article 19 of the Constitution of India. On the other hand, in the West Indies, where the Territories have their own traditions and are not territorially contiguous and where there is some disparity in economic conditions and opportunities for employment between one Territory and another, it is understandable that a Territorial Government should wish to retain some power of control over immigration into its Territories from another Territory. It would appear, therefore, that the placing of the control of movement of persons between Territories in the Concurrent Legislative List ³¹ is a concession to Territorial Governments. The overriding power of the Federal Legislature on a concurrent matter is, of course, a safeguard against the use of their powers of control by the Territories in a way inimical to the general interests of the Federation. The value of this safeguard, however, depends upon positive action by the Federal Legislature, and apparently for this reason the safeguard was not in itself considered sufficient. Hence the inclusion in the Constitution of articles 49 to 51, which implement the decisions of an Inter-Territorial Conference held in Trinidad in March 1955. They provide that from the end of the first five years no Territorial law controlling the inter-territorial movement of persons (except laws enacted for reasons of public health and security) shall have effect unless endorsed by resolution of each chamber of the Federal Legislature.

Extra-territorial legislation

Article 54 expressly authorises Her Majesty, by an Order in Council under article 53, the Federal Legislature and any Territorial Legislature to enact extra-territorial laws for any of the purposes stated in article 54. This article was enacted in pursuance of sections 1 (1) (a) (ii) and 2 (c) of the Act and there is nothing corresponding to it in other colonial constitutions.

Clearly the need to legislate with extra-territorial effect is likely to arise more frequently in a Federation entirely composed of islands separated from one another by the high seas than it is in a Federation whose units are territorially contiguous. It was, therefore, apparently

³¹ Para. 14.

considered desirable that the existence of this power should, at least for the purposes stated, be put beyond doubt. The doubt would, of course, have arisen by reason of the doctrine that a colonial legislature does not inherently possess a general power to enact extra-territorial laws. The history and basis of this doctrine is examined by Sir Ivor Jennings,³² and also very fully by Evatt J. in the Australian case *Trustees Executors and Agency Co. v. Federal Commissioners of Taxation*.³³ It appears that the correctness of the doctrine is certainly open to question. As Sir Ivor Jennings points out, the Judicial Committee has at no time formally decided that a colonial legislature has no power of extra-territorial legislation. It is also clear that, whatever validity the doctrine may have, there are circumstances in which a colonial legislature does have an inherent power to enact extra-territorial laws.³⁴ Apparently the draftsmen of the Act and the Constitution did not feel that it was safe to rely entirely on these cases as authority for the enactment of extra-territorial laws by the West Indian legislatures. That they took this view is hardly surprising for, despite the exceptions established by judicial decision, the supposed territorial restrictions on the powers of a colonial legislature are still sufficient to raise doubts as to the extent to which such a legislature may enact extra-territorial laws even though in part of the field there is a good deal less doubt than there used to be.³⁵ The opening words of article 54 are clearly intended to avoid an implication that the powers conferred by that article are to the exclusion of any other extra-territorial powers, including inherent powers, that the legislatures may possess.

Article 54 also refers to laws made by Her Majesty in Council. The writer knows of no specific authority for applying to Her Majesty in Council when legislating for a colony the territorial restrictions that are said to apply to the powers of a colonial legislature. Nevertheless when legislating for a colony Her Majesty in Council is, in a sense, a colonial legislature and it was no doubt thought that if the Act and the Constitution specifically conferred extra-territorial powers on the local West Indian legislatures and not on Her Majesty in Council, that might convey an indication that Her Majesty was not to have such powers.

³² *Constitutional Laws of the Commonwealth*, 1957 ed., Vol. 1, pp. 53 and 54.

³³ 1933, C.L.R. 220. (Part of his judgment is quoted by Sir Ivor Jennings *op. cit.*, pp. 109 to 112.)

³⁴ See *Croft v. Dunphy* and other cases cited by Sir Ivor Jennings and Evatt J. and also *Ex p. Greenberg* [1947] 2 All E.R. 550.

³⁵ The existence of such doubts has had to be taken account of in other Acts—e.g., s. 3 of the Statute of Westminster and equivalent provisions in recent independence Acts; also s. 66 (2) of the Civil Aviation Act, 1949 (c. 67).

6. THE EXECUTIVE

Scope of executive authority

Article 56 defines the scope of the Federal executive authority. It makes special provision with respect to external relations. There are two reasons for this: (i) executive authority in the field of external relations cannot really be satisfactorily defined by reference to potential subjects of legislation³⁶; (ii) it was necessary, since the Federation is a dependent territory, to qualify its authority in external affairs in order to take account of the fact that the international person responsible for the Federation is the United Kingdom.

The executive organ

The executive organ is the Council of State³⁷ which advises the Governor-General in the exercise of federal executive authority. This consists of a Prime Minister chosen by the House of Representatives from among its members³⁸ and ten other Ministers appointed on the recommendation of the Prime Minister of whom not less than three must be Senators and the remainder members of the House of Representatives. Article 59 describes the Council as "the principal instrument of policy"; but to ascertain the actual authority of the Council one must look at article 60, which codifies with some precision the relation between the Governor-General and the Council.³⁹

The general rule laid down by article 60 is that the Governor-General is to exercise his powers and perform his duties in accordance with the advice of the Council of State.⁴⁰ He may, however, act without consulting the Council in the circumstances described, and subject to the conditions laid down, in paragraphs (2) and (3). He may also, having consulted the Council, act contrary to its advice with respect to any of the particular matters referred to in paragraph (4). Furthermore,⁴¹ the rule that the Governor-General must act on advice from the Council does not apply to (i) functions conferred on him by any other law in terms which authorise their exercise without such advice; (ii) certain discretionary and special functions conferred by the Constitution which are listed in the Appendix to this paper;

³⁶ Such a definition was attempted in, for example, the Constitution of the Federation of Rhodesia and Nyasaland, article 36 (2) read with item 1 of the Federal Legislative List.

³⁷ Article 59.

³⁸ Article 62.

³⁹ Detailed provisions of this kind, which are not found, for example, in the Canadian or Australian constitutions, are typical of modern colonial constitutions which make provision for a ministerial system.

⁴⁰ Para. (1).

⁴¹ Para. (5).

(iii) the power to dissolve the Legislature; (iv) the power to dismiss Ministers. (The last two powers are to be exercised as nearly as may be in accordance with United Kingdom constitutional conventions—Royal Instructions of August 20, 1957, clause 3.)

Portfolios

Article 61 empowers the Governor-General to exclude certain subjects wholly or in part from Ministers' portfolios. It also confers responsibility for the initiation, conduct and discontinuance of criminal proceedings upon the Attorney-General, who is an officer appointed by the Governor-General under article 103.⁴² The Constitution of Nigeria contains more elaborate provisions to the same effect but in the Western and Eastern Regions, where the Attorney-General is appointed by the Government of the day, the responsibility is vested in a permanent official styled the Director of Public Prosecutions.⁴³

7. THE JUDICIAL POWER

The supreme judicial power within the Federation is vested in the Federal Supreme Court. The functions of the court are, broadly speaking, three-fold: (i) to adjudicate at first instance in disputes between governments⁴⁴; (ii) to act as a general court of appeal from the superior courts of the Territories⁴⁵; (iii) to "police" the Constitution. The third function will, of course, sometimes be discharged in the course of discharging the other two but article 81 (which follows the pattern of article 54 of the Constitution of the Federation of Rhodesia and Nyasaland) also gives the Federal Supreme Court jurisdiction to decide constitutional questions specially referred to it by the superior court of a Territory. The Constitution does not establish any system of subordinate Federal Courts (though the Federal Legislature could establish such courts under article 90). Instead article 72 provides that, subject to the original and appellate jurisdiction of the Federal Supreme Court, Territorial courts shall have jurisdiction in cases arising under the Constitution or under any Federal law. This scheme by and large follows the Australian model.⁴⁶

⁴² For a statement on the constitutional responsibility of the Attorney-General in England for criminal prosecutions see *Hansard*, January 29, 1951, cols. 681-688.

⁴³ ss. 231-233 of the Nigeria (Constitution) Order in Council, 1954, as set out in the Nigeria (Constitution) (Amendment) Order in Council, 1958—S.I. 1958 No. 429.

⁴⁴ Article 80.

⁴⁵ Article 83.

⁴⁶ The Constitution does not, however, contain anything equivalent to the statement in s. 71 of the Australian Constitution that "the judicial power of the Commonwealth shall be vested in" a Federal Supreme Court and certain other courts. The West Indies should not therefore be troubled by such problems as have

Removal of judges from office

Article 75 (3) provides that a judge of the Federal Supreme Court may be removed from office only if the Judicial Committee of the Privy Council advises that he ought to be removed on account of inability to perform his functions or misbehaviour. In most colonial territories, though the technical position is that judges hold office at the pleasure of the Crown, by virtue of Colonial Regulations a judge would not be dismissed unless the question of his dismissal had first been referred by the Secretary of State to the Judicial Committee of the Privy Council.⁴⁷ But the Constitution of the West Indies is the first instance of a statute in the Commonwealth constituting the Judicial Committee as the guardian of a judge's security of tenure and it may prove to be a precedent of some historical and constitutional importance. In England a judge of the High Court or Court of Appeal holds office during good behaviour subject to a power of removal upon an address to the Crown by both Houses of Parliament⁴⁸ and in most of the independent countries of the Commonwealth judges hold office on the same or somewhat similar terms. There would appear to be very good reasons for preferring the West Indies procedure. In particular, if one accepts the principle of judicial independence it is illogical to make a judge removable on an address from the legislative chamber or chambers, for then he is not independent of the legislature and, to the extent that the executive can control the legislature, he is not independent of the executive either. Indeed, that we have this particular procedure in England appears to be somewhat of an historical accident.⁴⁹ Furthermore, under the West Indies procedure (i) the judge in question would have *a right* to be heard and to be represented by counsel both before the local judicial inquiry which would inevitably precede any reference to the Judicial Committee and before the Judicial Committee itself⁵⁰; (ii) judges are better qualified to inquire

arisen under the Australian section in the form of the question what constitutes an exercise of the judicial power. (See, for example, *Waterside Workers Federation of Australia v. Alexander* [1918] 25 C.L.R. 434 and *The Commonwealth v. Melbourne Harbour Trust Commissioners* [1922] 31 C.L.R. 1.)

⁴⁷ For a fuller discussion of the tenure of office of Colonial judges see pp. 4 to 7 of the *Cambridge Law Review* for April 1954.

⁴⁸ Supreme Court of Judicature (Consolidation) Act, 1925, s. 12.

⁴⁹ The procedure seems to have its origin in the struggle of the judges, notably Coke, with the Stuarts, for the principle that the judges were independent of the Sovereign.

⁵⁰ The Constitution itself does not require a preliminary local inquiry of this kind but such an inquiry is required in all Colonies by Colonial Regulations and would in any event be necessary both to enable the Governor-General to ascertain whether there was any case to go to the Judicial Committee and to record evidence for the benefit of the Judicial Committee. Later constitutions which have adopted the West Indies procedure do in fact contain specific provision for such a preliminary inquiry by a tribunal of judges.

into charges of judicial misbehaviour than are members of a legislative chamber; (iii) the West Indies procedure makes it certain that a judge cannot be removed except with the approval of the Judicial Committee, whereas under the law of England it is very doubtful whether a judge can be removed only on an address from Parliament.⁵¹

The West Indies procedure has already been followed in Nigeria⁵² and Kenya⁵³ and also Malaya,⁵⁴ though in Malaya, for constitutional reasons, a special tribunal of judges takes the place of the Judicial Committee.

Original jurisdiction of Federal Supreme Court

Although article 80 of the Constitution bears some resemblance to section 78 of the Australian Constitution, the jurisdiction that it confers is more limited, being confined to disputes between governments and suits for penalties incurred under article 113. In addition to the jurisdiction conferred by article 80 the Federal Supreme Court has original jurisdiction to determine disputes as to the right of any person to be a member of the Federal Legislature⁵⁵ and may have further original jurisdiction conferred on it by Federal or Territorial law.⁵⁶

Appellate jurisdiction

Paragraph (1) of article 83 confers on the Federal Legislature power to define the appellate jurisdiction of the court.⁵⁷ The proviso, however, enables a Territorial Legislature, if it sees fit, to prevent an appeal going to the Federal Supreme Court in any dispute relating to a matter within the exclusive authority of the Territorial Legislature.⁵⁸ Paragraph (2) of article 83 further restricts the power of the Federal Legislature to confer appellate jurisdiction for it provides in effect that where a Territory has its own court of criminal appeal that court may not be by-passed except with the consent of the Territorial Legislature.

Appeals to Privy Council

Under article 87 provision for appeals to the Privy Council from the Federal Supreme Court is to be made by Federal law and under

⁵¹ Halsbury's *Laws*, 3rd ed., Vol. 7, p. 341.

⁵² Nigeria (Constitution) (Amendment) Order in Council, 1958, s. 76 (S.I. 958 No. 429).

⁵³ Kenya (Constitution) Order in Council, 1958, s. 61 (S.I. 1958 No. 600).

⁵⁴ Article 125 of the constitution annexed to the Federation of Malaya Independence Order in Council, 1957 (S.I. 1957 No. 1533).

⁵⁵ Article 42.

⁵⁶ Article 82.

⁵⁷ As an interim measure this was done by the Governor-General by regulations made under s. 2 of the Order in Council, *viz.*, the Federal Supreme Court Regulations (No. 3 of 1958) which were later amended by an Act of the Legislature (No. 2 of 1958).

⁵⁸ *Cf.*, article 56 of the Constitution of the Federation of Rhodesia and Nyasaland.

article 88 appeals cannot be brought direct to the Privy Council from a Territorial court except with the leave of the Federal Supreme Court.

8. REVENUE AND FINANCE

Federal revenues

In the West Indies the mistake made in the Australian Constitution of putting the centre in too strong a financial position relative to the states has not been repeated. Indeed the Constitution of the West Indies may have erred in the other direction. At any rate during the first five years the revenues to which the Federal Government will be entitled will be very modest.

The two substantial sources of revenue that are made available to the Federal Government are:

- (i) taxes on income and profits⁵⁹;
- (ii) customs and excise duties on the commodities listed in the Fourth Schedule.⁶⁰

Revenue from income and profits tax is, however, denied to the Federal Government during the first five years by the proviso to paragraph 35 of the Concurrent Legislative List. Furthermore, the combination of articles 95 (1), 93 and 94 imposes severe restrictions upon the Federal Government's power to derive revenue from customs and excise duties during that period.⁶¹ As a result of these provisions the sum that the Federal Government can raise in revenue in any of the first five years (apart from profits on the currency issue and incidental revenues such as fees, etc.) is £1,900,000; and it is evidently intended that this amount should be raised not by taxation but by means of mandatory levy.⁶²

After the first five years the Federal Government could presumably oust the Territorial Governments completely from the field of income and profits tax and (as respects the scheduled commodities) from the field of customs and excise, which in effect is what has happened in Australia as regards income tax.

⁵⁹ Concurrent Legislative List, para. 35.

⁶⁰ Concurrent Legislative List, para. 18 read with article 95 (2).

⁶¹ In the first place, the Federal Government may not during the first five years levy customs or excise duties for its own purposes at rates higher than those prescribed in the Fourth Schedule (article 95 (1)). Secondly, article 93 authorises the Federal Government to make an annual mandatory levy upon the Territorial Governments during the first five years which shall not exceed \$9,120,000 (£1,900,000), and article 94 provides that if in any of those years the mandatory levy and the amount of customs and excise duties raised by the Federal Government for its own purposes together exceed that sum the excess shall be paid over to the Territories.

⁶² Article 96 would also make it impossible for revenues in excess of that amount to be raised on behalf of the Federal Government by Order of Her Majesty in Council, assuming that such an unlikely method of raising revenue were to be contemplated.

Loans

The Constitution contains no machinery to control and co-ordinate borrowing by the governments within the Federation.⁶³ By virtue of paragraph 2 of the Exclusive Legislative List and paragraph 10 of the Concurrent Legislative List such machinery could be established by Federal law.

Customs union

The Constitution does not contain provision for internal free trade and a customs union.⁶⁴ The preamble to the Constitution, however, recites that it is essential for the economic strength of the area that there should be introduced "as far and as quickly as practicable a customs union, including internal free trade"; and it would appear that by virtue of paragraphs 18 and 37 of the Concurrent Legislative List a customs union and internal free trade could be imposed by Federal law. Apparently, however, there are practical difficulties to be overcome before a customs union could be established.⁶⁵

9. THE PUBLIC SERVICE

Chapter VII of the Constitution deals with the Federal public service. It vests in the Governor-General powers of control over the public service in the exercise of which he is not obliged to take ministerial advice, and it establishes, to advise the Governor-General in the exercise of those powers, a Public Service Commission which is not to include any member of the Federal Legislature.

APPENDIX

Functions of the Governor-General referred to in article 60 (5) (b).

<i>Article</i>	<i>Function</i>	<i>How exercised</i>
4	Appointment and removal of, and giving of instructions to, Deputy to Governor-General.	Discretion.
8	Appointment of a Senator for a Territory.	Discretion after consultation with the Governor of the Territory.

⁶³ *Cf.*, the Loan Council established in pursuance of section 105A of the Australian Constitution or the Loans Council established by article 88 of the Constitution of the Federation of Rhodesia and Nyasaland.

⁶⁴ *Cf.* ss. 88 and 92 of the Australian Constitution.

⁶⁵ See The Plan for a British Caribbean Federation, Report of the Fiscal Commissioner, 1955, Cmd. 9618.

<i>Article</i>	<i>Function</i>	<i>How exercised</i>
12 (2) (f)	Exemption of a Senator from vacating seat on account of interest in Government contract.	Discretion.
12 (3)	Removal of Senator who ceases to reside in the Territory for which he was appointed.	Discretion.
13	(a) Declaration that a Senator is unable to perform his functions or is again able to do so.	Discretion.
	(b) Appointment of a temporary member of the Senate for period of a Senator's inability.	Discretion after consultation with the Governor of the Territory concerned.
36 (3)	Assent or refusal of assent to, or reservation of, Bills.	Discretion.
39	Appointment of date for general election.	In accordance with the advice of Prime Minister.
61	Allocation of portfolios.	In accordance with the advice of Prime Minister.
63	Appointment of Ministers other than the Prime Minister.	In accordance with the advice of Prime Minister.
65	Appointment of a Minister to perform temporarily the functions of the Prime Minister.	Discretion if the advice of the Prime Minister cannot be obtained; in any other case in accordance with the advice of the Prime Minister.
68	Summoning of Council of State.	Either discretion or in accordance with recommendation of Prime Minister.
69	Nomination of three public officers to attend meetings of Council of State.	Discretion.
74	(a) Appointment of Chief Justice and Federal Justices.	Discretion after consultation with Prime Minister.
	(b) Appointment of first Chief Justice.	In accordance with instructions from Her Majesty.
75 (1)	Permission for judge to continue in office after retiring age.	Discretion.
75 (3)-(5)	Reference to Judicial Committee of question of removing a judge from office; suspension of a judge from performing his functions and revocation of such suspension.	Discretion after consultation with Prime Minister.

<i>Article</i>	<i>Function</i>	<i>How exercised</i>
76	Appointment of acting Chief Justice.	Discretion after consultation with Prime Minister.
77	(a) Appointment of person to be temporarily a judge of the Federal Supreme Court. (b) Revocation of such an appointment.	Discretion after consultation with Prime Minister. Discretion after consultation with the Chief Justice.
102	Appointment of members of the Public Service Commission; revocation of appointment; granting of leave to members and appointment of temporary members.	Discretion.
103 (1)	Appointment, dismissal and discipline of public officers.	Discretion after consultation with Public Service Commission except that he need not consult in case of certain officers and must Consult Prime Minister instead of the Public Service Commission in case of certain other officers.
103 (3)	Delegation of Governor-General's powers of appointment, etc., of public officers.	Discretion.
104	Making of regulations with respect to the Public Service Commission.	Discretion after consultation with the Public Service Commission.
112	Power of pardon, etc.	Discretion after consultation with such Minister as the Governor-General may determine.

CURRENT SURVEY

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This digest, which has been compiled by the Editor and G. J. Borrie, Barrister-at-Law, covers the period from April 1, 1959, to June 30, 1959.

UNITED KINGDOM

COMPULSORY PURCHASE

Compensation

Loss of goodwill and legal costs. The London County Council, as acquiring authority, served on the claimant a notice to treat in respect of the compulsory acquisition of his freehold business premises. In preparing his claim for compensation the claimant incurred legal and accountants' expenses as well as surveyors' and valuers' fees. He subsequently moved to leasehold premises in the same area, which he converted and continued his business. His earnings in the new premises were substantially higher than in the old. His claim included damage to the goodwill of his business and legal and accountants' costs. *Held*, (1) that the claimant was entitled to be compensated for loss of goodwill although no sale of the business was contemplated, the amount of damage to the goodwill being arrived at by comparing the capital value of the business at the old premises with that at the new; (2) that the legal and accountancy costs were recoverable as part of the compensation: *LONDON COUNTY COUNCIL v. TOBIN* [1959] 1 W.L.R. 354; [1959] 1 All E.R. 649, C.A.

COURTS

Judicial salaries

Recorders of Liverpool and Manchester, county court judges, metropolitan magistrates. The Judicial Offices (Salaries) Order, 1959, increases the salaries of the recorders of Liverpool and Manchester from £4,500 a year to £5,250 a year, the salaries of the county court judges and the chief metropolitan magistrate from £3,750 a year to £4,400 a year, and the salaries of the metropolitan magistrates, other than the chief magistrate, from £3,400 a year to £3,800 a year (S.I. 1959 No. 886).

Legal Aid

Account has been published of the receipts and expenses of the Law Society paid into and out of the Legal Aid Fund, 1957-58; together with the report of the Comptroller and Auditor General thereon (H.C. 197 of 1958-59).

Remuneration of counsel. The Legal Aid (General) (Amendment No. 3) Regulations, 1959, make provision for the remuneration of counsel in cases conducted by solicitors under the provisions of section 6 (7) of the Legal Aid and Advice Act, 1949. Counsel will receive 75 per cent. of the fee allowed on taxation instead of, as hitherto, a prescribed fee which could be varied by order made by the Lord Chancellor (S.I. 1959 No. 1060).

Privilege

Documents made in contemplation of litigation. Where it is claimed that certain documents are privileged on the ground that they are required for the purposes of the party's solicitor, it is not necessary that the documents should be intended solely or primarily for that solicitor; they are nonetheless privileged if one of the purposes is for submission to the solicitor.

A plaintiff, in an action for damages for the death of her husband while working on a railway, sought production of certain accident returns and reports relating to the accident. The defendants claimed privilege on the ground that one of the purposes of the documents was their submission to the defendants' solicitor in the event of a claim being made against them. *Held* that the documents were privileged as documents made after litigation was contemplated, with a view to assisting the defendants' solicitor in the defence of the action: *SEABROOK v. BRITISH TRANSPORT COMMISSION* [1959] 1 W.L.R. 509; [1959] 2 All E.R. 15, Havers J. (applying *Birmingham & Midland Motor Omnibus Co. v. London and North Western Ry.* [1913] 3 K.B. 850).

The mere fact that documents are prepared for the purposes, however unsubstantial and improbable, of furnishing information to a party's solicitor, is not a ground for claiming privilege for those documents.

A plaintiff, in the course of an action for personal injuries, asked the defendants for copies of reports which had been made following an inquiry into the circumstances of the accident. The reports had been prepared, it was said, to prevent the recurrence of the accident. In their affidavit claiming privilege the defendants stated that the documents came into existence "for the purpose, *inter alia*, of obtaining for and furnishing to the solicitor for the defendants evidence and information." *Held* that, in the circumstances, the claim to privilege had not been made out: *LONGTHORN v. BRITISH TRANSPORT COMMISSION* [1959] 1 W.L.R. 530; [1959] 2 All E.R. 32, Diplock J.

GOVERNMENT FUNCTIONS AND APPOINTMENTS

Civil Service

Staffs employed. A statement has been issued showing the numbers of civil staffs employed in government departments on April 1, 1959, as compared with April 1, 1958. It shows a total of 632,925 (including 254,864 Post Office staffs) on the later date which is an increase of 2,251 (Cmnd. 775; for previous statement, see [1958] P.L. 277).

Inspectorate

Fire. The report has been published of H.M.'s Inspector of fire services for Scotland, 1958 (Cmnd. 747).

Mines. The report has been published of H.M.'s Chief Inspector of mines and quarries, 1958 (H.M.S.O. 41-112-0-58).

Police. The report has been published of H.M.'s Inspectors of constabulary for England and Wales, 1957-58 (H.C. 202 of 1958-59).

Ministers' Functions

Education. The report has been published, with statistics, of the Ministry for 1958 (Cmnd. 777).

Health. The report has been published of the Department of Health for Scotland, 1958 (Cmnd. 697).

Police. The report has been published of the tribunal appointed to inquire into the allegation of assault on John Waters (Cmnd. 718).

The proceedings of the tribunal have been published by the Scottish Home Department (H.M.S.O. 49-440).

Powers of entry

The Minister of Housing and Local Government gave a list of statutory powers entitling central or local government officers to enter land or premises (604 H.C. Deb. 138-140, April 29, 1959).

Research

Agricultural Research Council. The report for 1957-58 has been published (Cmnd. 750).

Agricultural Research Fund. The account for 1957-58 has been published, together with the report of the Comptroller and Auditor General thereon (H.C. 172 of 1958-59).

Department of Scientific and Industrial Research. The report of the Research Council, 1958, has been published (Cmnd. 739). See also PARLIAMENT (below, p. 321).

See also PUBLIC AUTHORITIES (below, p. 324).

HIGHWAYS

Amendment and consolidation

The Highways Act, 1959 (7 & 8 Eliz. 2, c. 25) received the Royal Assent on April 30, 1959. It comes into operation on January 1, 1960.

Private street works

If a local authority abandons a resolution to make up a road under section 6 of the Private Street Works Act, 1892, it can later make another similar resolution to make it up notwithstanding that objections to the first resolution are outstanding and no notice of abandonment has been given.

In 1931 a local authority resolved to make up a road under section 6 of the Act. Objections were lodged but nothing further was done and the resolution was in fact abandoned, though no notice of abandonment was given. In 1948 a similar resolution was passed to make up the same road. The resolution contained no reference to the resolution of 1931. Objections were lodged. In 1952 the authority resolved to amend the estimate and provisional apportionment of the 1948 resolution. Objections to the last resolution were taken before a magistrate. *Held*, that neither the resolution of 1931 nor its informal abandonment invalidated the resolution of 1948 or the amendment of 1952; for section 6 of the Act gave power "from time to time" to resolve to make up the road: *R. & T. GLYNN EVANS v. LIVERPOOL CORPORATION* [1959] 2 W.L.R. 749, D.C.

HOUSING

Debates

The House of Commons debated local authority housing in Committee of Supply on June 18, 1959 (607 H.C. Deb. 657-784), and housing in London on June 25, 1959 (607 H.C. Deb. 1471-1530).

Loans for house purchase, and improvement grants

The House Purchase and Housing Act, 1959 (7 & 8 Eliz. 2, c. 33) received the Royal Assent on May 14, 1959.

The Act deals principally with assistance to building societies by the Exchequer to enable them to make loans for house purchase up to 95 per cent. of the value of the property, and local authority grants for the improvement of houses. The Act introduces a new form of grant, known as the "standard grant" to assist the provision of certain "standard amenities"

and also eases the conditions attaching to the making of improvement grants under the Housing (Financial Provisions) Act, 1958 (6 & 7 Eliz. 2, c. 42).

The Act, of which Part II, sections 26 and 27, and Part I of the First Schedule do not apply to Scotland, and which does not apply to Northern Ireland, came into force on June 14, 1959, one month after the date on which it received the Royal Assent.

Underground rooms

The Housing (Underground Rooms) Act, 1959 (7 & 8 Eliz. 2, c. 34) received the Royal Assent on May 14, 1959.

This Act alters the circumstances in which, under section 18 of the Housing Act, 1957 (5 & 6 Eliz. 2, c. 56) an underground room is deemed to be unfit for habitation by providing that the general provision contained in section 4 of the 1957 Act as to defects rendering houses unfit for habitation shall no longer be taken into consideration (section 1). The Act, which does not extend to Scotland or to Northern Ireland, came into force on June 14, 1959, one month after the date on which it received the Royal Assent.

The Ministry of Housing and Local Government has issued a circular on the Act (Circular No. 38/59).

LOCAL GOVERNMENT

Education

Scotland. The Further Education (Scotland) Regulations, 1959, replace the Further Education (Scotland) Code, 1952, which prescribes the conditions upon which grants to education authorities from the Education (Scotland) Fund in respect of further education centres are paid; the Central Institutions (Scotland) Grant Regulations, 1947 and 1958, which prescribe the method of calculation and payment and the conditions attaching to grants payable from the Fund to the governors of central institutions; and the Further Education (Voluntary Associations) (Scotland) Grant Regulations, 1952, which provide for the approval of voluntary associations for grant purposes and prescribe the method of calculation and payment and the conditions attaching to grants payable from the Fund to these associations.

Under the Local Government and Miscellaneous Financial Provisions (Scotland) Act, 1958, the Education (Scotland) Fund is being abolished, and the expenditure of education authorities on further education centres is to become relevant expenditure for the purpose of assessing general grant. The expenditure upon grants to central institutions and voluntary associations is to be payable out of moneys provided by Parliament under section 70 of the Education (Scotland) Act, 1946, as amended by the Fourth Schedule to the Act of 1958.

Part I of these Regulations prescribes under section 1 (8) of the Act of 1946 standards and general requirements relating to the conduct by education authorities of further education centres. These standards and requirements are substantially the same as the conditions prescribed in the Code of 1952 upon which grants were paid to education authorities from the Education (Scotland) Fund in aid of their expenditure on further education.

Part II provides for the payment of non-recurrent and recurrent grants to central institutions and approved associations under section 70 of the Act of 1946 as amended. The non-recurrent grants are to be in aid of capital expenditure and the recurrent grants in aid of expenditure on administration and maintenance of the central institution or of the approved association and its activities. Part II also prescribes the method of assessment and payment of the grants and the conditions upon which they are paid. These conditions are substantially the same as the conditions prescribed in the Regulations of 1947 and 1952. So far as recurrent grants to central institutions are concerned the new method of assessment under which the

amount of the grant is fixed in advance after consideration of the nature, efficiency, extent and estimated cost of the service is a departure from the present system under which payments to account are made during the financial year of the central institution and the amount of the grant is not finally assessed until the accounts for the year are available (S.I. 1959 No. 477 (S. 21)).

The Scottish Education Department has issued a circular to inform education authorities and other governing bodies of further education establishments of the views of the Secretary of State on various matters concerning the provision of facilities for further education, in view of the passing of the Local Government and Miscellaneous Financial Provisions (Scotland) Act, 1958, and the Further Education (Scotland) Regulations, 1959 (Circular No. 405).

Finance

Rating and Valuation. The following decision has been reported on the interpretation of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955: *Skegness U. D. C. v. Derbyshire Miners' Welfare Committee* [1959] 2 W.L.R. 711; [1959] 2 All E.R. 258, H.L.

In *EVANS v. BROOK* [1959] 1 W.L.R. 657; [1959] 2 All E.R. 399 the appellant ratepayer had claimed to be entitled to partial relief from rates under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, but the rating authorities rejected the claim and applied for a distress warrant. The magistrates held that they had no jurisdiction to inquire into the question whether the appellant was entitled to such relief. The Divisional Court held that the magistrates had such jurisdiction, since the facts were agreed and not complicated.

The Rating and Valuation Act, 1959 (7 & 8 Eliz. 2, c. 36), received the Royal Assent on May 14, 1959. The Act postpones the coming into force of new valuation lists under Part III of the Local Government Act, 1948, until April 1, 1963 (section 1 (1) (2)); proposals for alteration of current valuation lists under section 40 of the 1948 Act, other than those made by valuation officers, rating authorities (under section 40 (2A)) and owners or occupiers of the hereditament to which the proposal relates are restricted (section 1 (3)); section 2 postpones until March 31, 1963, the coming into effect of notices served under section 8 (3) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, to terminate or reduce, from an earlier date, the relief for charitable and other organisations given by that section; section 3, financial provisions; section 4, short title, interpretation and extent.

The Act does not extend to Scotland or to Northern Ireland.

Members

Interest. On April 23, 1959, the House of Commons, on a matter relating to Walsall, debated the power of the Minister to grant dispensations under section 71 of the Local Government Act, 1933 (604 H.C. Deb. 755-762).

Powers

Lease of land. By a local Act the predecessors in title of an Urban District Council were empowered to "sell and convey or dispose of" a lake and pleasure grounds and to let any refreshment rooms erected thereon for any term not exceeding three years. By a further local Act the Council was empowered to let for any period not exceeding seven years any pavilion on the land. In 1910 the Council leased the lake and grounds to amusement caterers for fourteen years. In 1921 the property comprised in the lease was surrendered to the Council by deed to the intent that the term should merge and the Council let the property to the caterers for twenty-one years. In 1932 there was a similar surrender of the 1921 lease and the Council let the property to the caterers for a new term of thirty-one years. The rent

under the new lease was payable on May 1 and November 1 in each year. The Council had power under section 177 of the Public Health Act, 1875, to grant the leases with the consent of the Local Government Board of the Minister of Health but no such consent was obtained to the leases of 1921 and 1932. The caterers stayed in possession, paying the rent reserved by the lease of 1932 and declined to accept a notice by the Council dated June 10, 1954, to quit the premises "which premises you hold of the said Council as yearly tenants on May 1, 1955." The caterers served a notice under section 26 (1) of the Landlord and Tenant Act, 1954, and started proceedings for a new lease under that Act, claiming that the lease of 1932 was current and alternatively that a yearly tenancy subsisted. In 1955 the Council served a statutory notice under section 25 (1) of the Act of 1954, to which the caterers replied with a counter-notice under section 25 (5), stating their unwillingness to give possession. *Held*, (i) by asking for a new lease the caterers had not put it out of their power to rely on the lease of 1932. For they had always made it clear that they relied on the Act of 1954 only as an insurance if the lease of 1932 turned out to be invalid. (ii) The lease of 1932 was invalid. The power in the local Act to "dispose of" land meant only to dispose of it absolutely, not to let it. Therefore the grant was *ultra vires*. (iii) The Council could not be estopped by accepting rent under it from denying the validity of the 1932 lease. (iv) The lease of 1921 was invalid for the same reasons. Assuming that the lease of 1910 was valid it was validly surrendered by the deed of 1921, even though it was made in consideration of the invalid lease of 1921. But the surrender may have been voidable until the lease of 1910 would have expired. (v) The dates of the payment of rent under the void lease of 1932 were incorporated into the yearly tenancy on which the caterers held, at any rate by 1954. Thus the notice to quit was properly given for one of those dates, and it became effective on the date for which it was given. (vi) Any claim the caterers might have had for damages for breach by the Council of a duty to obtain consent to the letting was statute-barred even though time had run under the Limitation Act, 1623, by the time the Limitation Act, 1939, which alone was pleaded, came into effect. The breach was not a continuing breach: *RHYL U. D. C. v. RHYL AMUSEMENTS* [1959] 1 W.L.R. 465; [1959] 1 All E.R. 257, Harman J.

Royal Commission

The Minutes of Evidence of the Royal Commission on Local Government in Greater London have been published for Days 1-10 (H.M.S.O. 73-35-1 to 10).

Social workers

Report has been published of the Working Party (Chairman: Miss E. L. Younghusband) on social workers in the local authority health and welfare services (H.M.S.O. 32-457).

See also COMPULSORY PURCHASE (above, p. 310), GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 311), HIGHWAYS (above, p. 312), HOUSING (above, p. 312), PUBLIC HEALTH (below, p. 325), TOWN AND COUNTRY PLANNING (below, p. 327).

MONOPOLIES AND RESTRICTIVE PRACTICES

Cotton Industry

The White Paper on Reorganisation (Cmd. 744) and the Cotton Industry Bill (106) have been published.

Resale price maintenance

Plaintiffs sought to restrain the defendants under section 25 (1) of the Restrictive Trade Practices Act, 1956, from supplying twenty-six ounce bottles

of "Lucozade" at less than the current fixed price which it was alleged was 2s. 9d. a twenty-six ounce bottle. The label on the bottle was marked in bold figures 2s. 6d. followed by a statement in less bold characters "plus 3d. deposit returnable on bottle with stopper." The current price list showed that a twenty-six ounce bottle of Lucozade was 2s. 6d. plus 3d. Two persons had paid 2s. 7d. for twenty-six ounce bottles of Lucozade which they had obtained from the defendants. Vaisey J., dismissing the action, *held* that the property in the bottle was not intended to pass to the customer. The bottle in this transaction was never sold at all, but was merely lent or hired as a convenient receptacle for carrying the liquid home. The transaction consisted of the payment of 2s. 6d. in full as the price of the liquid and 3d. for the hire of the bottle. In those circumstances section 25 (1) of the Act of 1956 was inapplicable since the Act applied only to sales and had nothing to do with hiring agreements: *BEECHAM FOODS v. NORTH SUPPLIES (EDMONTON)* [1959] 1 W.L.R. 643; [1959] 2 All E.R. 336.

Restrictive Practices Court

Decision. It is not enough for a trade association to prove that a restriction is harmless or might do good. If it is to be saved, it must be shown that on its particular facts it is within one of the exceptions to the Restrictive Trade Practices Act, 1956.

An association whose members manufactured 70 per cent. of the blankets made in the United Kingdom resolved to recommend to its members: (i) To charge not less than a specified price for "specified blankets." These were white all wool raised blankets. The specified price was ascertained quarterly by ascertaining the costs of manufacture of the most efficient member. A negligible number of the specified blankets was sold at the minimum price.

(ii) Not to make white or pastel blankets of less than a specified quality. The specification provided a practical, but not conclusive, test of the minimum desirable quality. A housewife buying a blanket could not tell for herself whether a new blanket was of the specified standard.

(iii) To observe certain standard terms of trade regulating the relations between manufacturers and retailers. *Held*, (i) above, though approximating to a stop-loss scheme, was not of specific and substantial benefit to the public within section 21 (1) (b) of the Act. (ii) above did confer substantial and specific benefits on the public which outweighed the disadvantages that lighter-weight and cheaper blankets were not easily available in the shops. (iii) above did not confer such a benefit on the public.

Per curiam: "As in the case of the minimum price scheme, our judgment on [(iii) above] depends on the particular facts of this particular case and does not necessarily afford a guide to other cases where different circumstances exist": *Re BLANKET MANUFACTURERS' AGREEMENT* [1959] 1 W.L.R. 442; [1959] 2 All E.R. 1.

Restrictive trading agreements

The President of the Board of Trade stated that 205 registered agreements had been abandoned or all registrable restrictions removed from them and that the Registrar of the Court had been informed that similar steps were being taken in respect of another 150 (604 H.C. Deb. 587, April 23, 1959).

NATIONAL HEALTH SERVICE

Appointment of specialists

On May 12, 1959, the House of Commons debated the actions of the Manchester Regional Hospital Board and Mr. A. H. Barber (605 H.C. Deb. 1205-1216).

Amending regulations governing methods of appointments have been made (S.I. 1959 No. 909).

Central Health Services Council

Report of the Council for 1958 has been published preceded by a statement by the Minister of Health (H.C. 218 of 1958-59).

General Optical Council

The Opticians Act, 1958, s. 18, requires the General Optical Council to set up a committee, to be known as the Companies Committee, to whom they shall refer for advice on certain matters relating to bodies corporate carrying on business as ophthalmic or dispensing opticians. Rules have been made providing for the constitution of this committee (S.I. 1959 No. 955).

The Opticians Act, 1958, s. 17, requires the General Optical Council to set up a committee, to be known as the Education Committee, to whom they shall refer for advice on all matters relating to optical training and examinations. Rules have been made providing for the constitution of this committee (S.I. 1959 No. 956).

Mental Health Legislation

Second report has been published of a Committee appointed by the Scottish Health Services Council (H.M.S.O. 49-436).

Remuneration

Royal Commission. The minutes of evidence for the 23rd Day (British Medical Association) have been published (H.M.S.O. 73-33-23).

See also PARLIAMENT (below, p. 321).

NATIONAL INSURANCE

Decisions of the Commissioner and the Tribunal

Absence from Great Britain. Claimant went to Switzerland for a period on his doctor's advice for rest and good food. He stayed at a sanatorium where he was looked after by nurses and given medicine to strengthen him during his convalescence. He was subject to control as to his hours of exercise, times for meals and retiring to bed. The claimant did not require the services of the doctor of the sanatorium. *Held* that he was temporarily absent from Great Britain for the specific purpose of being treated and not disqualified for receiving sickness benefit during such period as the Minister may allow: Decision No. R(S) 2/59.

Availability for employment. A married woman, after being employed part-time as a tailor's finisher for fifteen years, had been unemployed for over three months when she refused full-time similar employment because of her domestic responsibilities. *Held* that the claimant's restrictions on hours of work were not unreasonable in view of her domestic circumstances and past record and that she was entitled to longer time in which to find employment comparable with that which she had lost after fifteen years' service. General question discussed whether employment outside the reasonable restrictions imposed by a claimant could at any time be regarded as suitable employment: Decision No. R(U) 2/59.

Claimant was employed and lived in her mother's boarding house. During the winter the house was closed when the claimant did a little work and had cheap board and lodging. She held herself available for employment for the winter months only. *Held* that the claimant was unemployed in the winter. *Held* also that Regulation 6 (1) (aa) of the Unemployment and Sickness Benefit Regulations applied to her. By restricting her availability to the

winter months she had no reasonable prospects of employment and she satisfied none of the escape provisions: Decision No. R(U) 3/59.

A school teacher lived with his wife and four children in a rural area in a tied cottage which was provided with his wife's employment. He left his employment to look after his youngest child at home, no other person being available to do so. He was available for employment in the afternoons and was not suited for heavy manual work. *Held* that he had just cause for voluntarily leaving his employment but was not available for employment. He had no reasonable prospects of securing employment, and was not helped by sub-paragraph (i), (ii) or (iii) of Regulation 6 (1) (aa) of the Unemployment and Sickness Benefit Regulations: Decision No. R(U) 6/59.

Child's special allowance. The innocent party to a bigamous marriage claimed child's special allowance. *Held* that since such a marriage was void from the beginning it was not a marriage which could be terminated by divorce and it was not a voidable marriage which had been annulled: Decision No. R(G) 3/59.

Delay in claiming pension. When claimant reached pensionable age on September 15, 1957, she could have been treated as retired. She elected not to retire so that she could earn increments to her pension. There was a change in the law on January 6, 1958, regarding her classification in insurance. She made inquiries on January 17, 1958, and was told that she could no longer contribute. Accordingly she gave notice of retirement and claimed pension on February 4, 1958. *Held* that her deliberate election not to claim pension was good cause for delay in giving notice of retirement but not for delay in claiming. She was entitled to a reasonable period in which to reconsider the matter after January 6, 1958, and accordingly from that date had good cause for not claiming: Decision No. R(P) 3/59.

Guardian's allowance. The mother of the illegitimate child in respect of whom the claim was made had died and the whereabouts of the father were not known with certainty. The claimant agreed that a man traced in records of the Ministry of Pensions and National Insurance was the father but contended that paternity could not be legally established. She was not willing to attempt to ascertain his whereabouts. *Held* that it had been shown that the man traced was the father and the claimant had not proved that he was dead or that she had failed after all reasonable efforts to discover his whereabouts and, therefore, the claimant was not entitled to a guardian's allowance in respect of the child: Decision No. R(G) 4/59.

Home confinement grant. Six months before claimant's confinement, arrangements were made on her doctor's advice, for her confinement to take place in hospital. Because of an outbreak of infection in the maternity ward, she and her baby were discharged home less than twenty-four hours after her admission. Owing to the infection, the district nurse declined to attend her, and the claimant had to engage a private nurse. *Held* that, nevertheless, home confinement grant was not payable, as the arrangement for admission was made, more than two days before she was admitted. The Commissioner had no jurisdiction to relax or modify the statutory conditions: Decision No. R(G) 1/59.

The claimant wished to be confined at home, but because complications were feared her doctor made provisional arrangements with her knowledge and consent two and a half months before her confinement for her emergency admission to hospital. The claimant had, nevertheless, to make alternative arrangements to be confined at home. She was in fact confined in hospital. *Held* that home confinement grant was not payable. It was impossible to say that no arrangements for the claimant's admission to hospital were made more than two days before she was admitted: Decision No. R(G) 2/59.

Retirement. Claimant ceased working in his regular occupation of fitter, intending to work twelve hours a week in his off-licence business. Owing

to his wife's ill health, he was forced to attend the shop during the afternoons for twenty hours a week. Relatives looked after the shop in the evenings when most of the business was done although the shop, being an off-licence, remained open during licensing hours. *Held* that the claimant's occupation was not inconsistent with retirement. He lived on the premises but was unlikely to be called upon in the evenings and thus enjoyed a large degree of freedom from the hours and restraints of normal business: Decision No. R(P) 2/59.

Sickness benefit. Up to February 18, 1958, when he became incapable of work claimant had regularly contributed 28s. a week to the maintenance of his wife, from whom he was separated. Prior to February 5, 1958, this was sufficient to satisfy the condition that he was contributing at a weekly rate of not less than the "amount of the increase" of sickness benefit payable for an adult dependant. From February 5, 1958, however, by the National Insurance (No. 2) Act, 1957, the "amount of the increase" was raised to 30s. a week. When in April 1958 claimant was made aware of the statutory change, he increased his contribution retrospectively to 30s. a week with effect from January 31, 1958, except for the two weeks of incapacity from February 18, 1958. *Held* that when not incapable of work the claimant was contributing to his wife's maintenance at a weekly rate of not less than the "amount of the increase" and there was no evidence of intention to cease contributing to at least the statutory level. The claim for increase of sickness benefit was allowed: Decision No. R(S) 1/59.

Training for subsequent employment. A claimant received a subsistence allowance but no wages for a week during which he was undergoing full-time training in the duties of a bus conductor. It was understood that employment, which was conditional on prior training, would follow if a trainee proved efficient, but he was free to cease training at any time if an opportunity of other employment occurred. *Held* that, applying the principles long established by the Umpire under the Unemployment Insurance Acts and followed in Decision 4903, the claimant must be regarded as not unemployed whilst training, despite the fact that the employers did not regard him as employed during that period for the purposes of payment of national insurance contributions: Decision No. R(U) 4/59.

Validity of marriage. In 1938, claimant went through a ceremony of marriage with a man whose first wife had disappeared in 1921. He had been advised by a solicitor that he could lawfully marry her. In 1955, the husband learnt that his first wife was still alive. He divorced her in 1956 and went through a second ceremony of marriage with claimant when she was over sixty. He died in January 1958 when she had not been three years married. Claimant contended that she was "disqualified" for benefit before the marriage and escaped the three years marriage condition. *Held* that the 1938 marriage was invalid and that claimant was not validly married until 1956. She was not "disqualified for" but "disentitled to" benefit before marriage. As her marriage lasted less than three years she was not entitled to retirement pension on his insurance: Decision No. R(P) 1/59.

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 328).

NATIONAL INSURANCE (INDUSTRIAL INJURIES)

Decisions of the Commissioner and the Tribunal

"Out of and in the course of employment." Claimant required to work at a depot ten miles from his normal place of work. He was injured on the public highway while walking to meet his employer's lorry which was late in arriving to take him back to his normal place of work where he was required to report at the end of the day. *Held* that, although acting without instructions in leaving the depot before the arrival of the expected transport,

the claimant acted for the purposes of and in connection with his employer's trade and business and was travelling "on duty": Decision No. R(I) 4/59.

Claimant remained at work while most of his gang went into a hut and started drinking to celebrate the Christmas holiday. Later, his leg was broken by a kick from one of the gang. The attack was unprovoked, and claimant had no dispute with his assailant. *Held* that the accident did not arise out of the claimant's employment, which did not expose him to a special risk of assault. There was no evidence of a practice of drinking bouts in this employment either at Christmas or other times and if the assailant were drunk, the risk of injury from an unprovoked attack of a drunken man during the Christmas season was a common one: Decision No. R(I) 5/59.

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (below, p. 328).

NATIONALISED INDUSTRIES

General

Capital investment. A White Paper has been published on capital investment in the coal, electricity and gas industries (Cmnd. 713).

Debate. On May 4, 1959, the House of Commons in Committee of Supply debated fuel and power (605 H.C. Deb. 32-154).

Finance. Reports and accounts have been published of the advances made and accounts received in respect of the Airways corporations and the British Transport Commission, 1957-58; also of the electricity and gas corporations, 1957-58; together with the reports of the Comptroller and Auditor General thereon (H.C. 150, 156 and 164 of 1958-59).

Airways

Guarantees. Statements have been issued by the Treasury on loans proposed to be raised by the British Overseas Airways Corporation (H.C. 180 of 1958-59) and the British European Airways Corporation (H.C. 179 of 1958-59).

Atomic Energy

Balance sheet of the United Kingdom Atomic Energy Authority has been published as at March 31, 1958; together with the report of the Comptroller and Auditor General thereon (H.C. 209 of 1958-59).

Coal

Account has been published of the sums issued out of and received from the Consolidated Funds and of other sums received from the National Coal Board; together with the report of the Comptroller and Auditor General thereon (H.C. 162 of 1958-59).

Report and accounts of the National Coal Board, 1958, have been published in two volumes (H.C. 158, 159 of 1958-59).

See also **General** (above).

Electricity

Contracts. The Paymaster-General stated that the report by Messrs. Deloitte, Plender, Griffiths and Co. on the operations of the Special Contracting Section of the London Electricity Board had been placed in the Library of the House of Commons (603 H.C. Deb. 98, April 16, 1959).

Guarantees. Statements have been issued by the Treasury on loans proposed to be raised by the Electricity Council (H.C. 137, 181 of 1958-59), the South of Scotland Electricity Board (H.C. 184 of 1958-59) and the North of Scotland Hydro-Electric Board (H.C. 183 of 1958-59).

Highlands and Islands. On June 8, 1959, the House of Commons debated electrification in the Highlands and Islands (606 H.C. Deb. 769-82).

Undue discrimination. Section 37 (8) of the Electricity Act, 1947, provides: "An area board, in fixing tariffs [for the supply of electricity] . . . shall not show undue preference to any person or class of persons and shall not exercise any undue discrimination against any person or class of persons. . . ." The pursuers were users of electricity supplied at high voltage, which admittedly costs less to supply than the same amount of power at low voltage. The defenders recognised this by charging a higher price per unit to low voltage consumers, but the pursuers' case was that the difference of price under the tariffs did not adequately reflect the difference in cost and that, in fact, the price charged for high voltage supply was not as low as it ought to have been in comparison with the price charged to low voltage consumers. That, they contended, constituted undue discrimination against them and other high voltage consumers. The defenders contended that, in determining whether there had been undue discrimination or undue preference against any consumer, what must alone be compared were the prices charged, while the pursuers contended that, in making a comparison, one must have regard to the costs of supply to the two classes of customer. *Held* (1) (Lords Reid and Keith of Avonholm dissenting) that undue discrimination did not depend solely on a price comparison between classes of consumers; the cost of supply was also a relevant factor; (2) that sums which could be proved to have been overcharged were recoverable: *SOUTH OF SCOTLAND ELECTRICITY BOARD v. BRITISH OXYGEN CO.; SAME v. BRITISH OXYGEN GASES* [1959] 1 W.L.R. 587; [1959] 2 All E.R. 225, H.L.

See also **General** (above).

Gas

Guarantee. A statement has been issued by the Treasury in respect of loans proposed to be raised by the Gas Council (H.C. 182 of 1958-59).

See also **General** (above).

Transport

Consultative committees. Reports have been published for 1958 of the Central Committee, the Committee for Scotland and the Committee for Wales and Monmouthshire (H.C. 193, 194, 195 of 1958-59).

Debate. On June 25, 1959, the House of Lords debated the British Transport Commission Bill on Second Reading (217 H.L. Deb. 239-252).

Guarantee. A statement has been issued by the Treasury in respect of loans proposed to be raised by the Commission (H.C. 185 of 1958-59).

Reports and accounts of the Commission for 1958 have been published in two volumes (H.C. 216, 216-I of 1958-59).

See also **General** (above), **TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS** (below, p. 328).

PARLIAMENT

Estimates Committee (House of Commons)

Reports. The Committee has published its 4th Special Report being observations of the Minister of Defence and Service Ministers and a note by the Committee on Lands Branches of the Services Departments (H.C. 123 of 1958-59); also its 5th Special Report being observations of the Minister of Health and comments of the Committee thereon on running costs of hospitals (H.C. 124 of 1958-59); also its 6th Special Report being observations of the Council for Scientific and Industrial Research on D.S.I.R. (H.C.

224 of 1958-59); also its 7th Special Report being the observations of the Treasury on Treasury control of expenditure (H.C. 227 of 1958-59).

Members

Salaries. On May 15, 1959, the Speaker announced that with the concurrence of the Chancellor of the Exchequer, salaries of M.P.s would start from the day following that on which the poll was held (605 H.C. Deb. 1569-70).

Procedure

Private Bills. On April 28, 1959, the Earl of Home stated that notice would in future be given by the Lord Chairman of Committees of the salient points in Private Bills to a Committee representative of the Parties for their observations (215 H.L. Deb. 1053-1056).

Select Committee. The report of the Select Committee on Procedure, with its proceedings, minutes of evidence and appendices has been published (H.C. 92-I of 1958-59).

The committee's recommendations include the following proposals:

1. That the use of standing committees for the detailed examination of Bills that have had their second reading in the House of Commons should be extended. At present, although many measures are sent to standing committees at this stage, a considerable number are debated, clause by clause, by the whole House sitting in committee. It is suggested that, in future, this procedure should be limited (save in very exceptional circumstances) to Consolidated Fund Bills, Bills of major constitutional importance, and Bills where the committee stage is a formality. The select committee believes that the greatest single economy that could be produced in the time spent on the floor of the House would be to commit the Finance Bill (which occupied seventy hours during the parliamentary session 1956-57), at least in part, to a standing committee.
2. That there should be some revision in the composition and size of standing committees, and particularly in the size of those appointed to consider minor Bills. At present, all standing committees (except the Scottish Standing and Grand Committees) consist of twenty members appointed by the Committee of Selection, and up to thirty additional members. The select committee recommends that, in future, the members of standing committees should be appointed in respect of each individual Bill, and that the distinction between the nucleus of a committee and the added members should be abolished; expert members should be chosen first and the remainder added afterwards to ensure balance. It is considered that the size of a committee appointed to consider minor Bills need not exceed twenty to twenty-five members.
3. That, in general, speeches during debates should be as brief and concise as is consistent with the importance and complexity of the subject under discussion, and that, on the occasion of major debates, an hour be set aside for five-minute speeches, during which, by convention, members should not intervene. At present, a member of the House of Commons, once called, is "in possession of the floor of the House," and may, if he wishes, speak for the rest of the debate.
4. That the procedure which, at present, demands the presence in the House of all the members during the early hours of the afternoon in case there should be a division, should be altered in such a way as to relieve members of obligatory attendance at that time. The committee does not consider that a change of this kind would adversely affect the numbers actually present in the debating chamber during the afternoon.

5. That the number of oral questions allowed per member per day should be reduced from three to two, and that the House should support the Speaker when he intervenes to curtail the number and length of supplementary questions from either side of the House. It is considered that, if these changes were made, a greater number of members would receive oral replies than is at present possible in the daily hour of Question Time.

The Select Committee also recommended certain changes in the procedure relating to the programme for private members' Bills and for private Bills; it suggested alterations in the method of balloting for subjects for motions for the adjournment at the end of the day's business so that greater topicality would be achieved; and it made a number of other proposals designed to ensure that attendance at the House should be as rewarding as is possible to as many members as possible. Some methods of achieving this object were discussed by the committee, but were not included in the recommendations since no general agreement could be reached. Proposals considered, but rejected on this ground, included the introduction of mechanical voting or voting by proxy, and the introduction of morning sittings, during which debates would take place but no divisions would be allowed. There were also differing views as to whether membership of the House of Commons should demand full-time service or whether the House would be better served by retaining a number within its ranks who bring to its deliberations the benefit of their knowledge and experience derived from other fields during such hours of the day as their attendance could be spared from the precincts of Westminster.

In summing up, the committee expressed the hope that its suggestions would both save the House from having to keep unduly late hours except in very special circumstances, and also provide more opportunity for debate. It pointed out, however, that, in a deliberate and legislative assembly of some 630 members, the occasions for speaking could not but be relatively rare, and the requirement of attendance often more demanding than some members might wish. But, because it unanimously held the view that the claims of the House were paramount, the committee believed that this requirement of attendance was not without profit, even when business was only of limited appeal. There was more in parliamentary duty than simply speaking and voting; apart from listening, members had always spent and should spend a considerable proportion of their time in private discussion in the lobbies away from the formal atmosphere of the House. It was time thus spent that had built up the corporate spirit of the House over the centuries and, in the view of the committee, had this not been so, "the House of Commons would have become an institution weaker in body and poorer in spirit." (This summary is based on Commonwealth Survey, C.O.I., March 28, 1959.)

Public Accounts Committee (House of Commons)

Report. The Committee has published its second report on virement between votes of service departments (H.C. 201 of 1958-59).

Statutes

Royal Assent. The Highways Act, 1959 (7 & 8 Eliz. 2, c. 25) (see above, p. 312), and the Colonial Development and Welfare (Amendment) Act, 1959 (7 & 8 Eliz. 2, c. 29) (see below, p. 330), received the Royal Assent on April 30, 1959; the House Purchase and Housing Act, 1959 (7 & 8 Eliz. 2, c. 33) (see above, p. 312), the Housing (Underground Rooms) Act, 1959 (7 & 8 Eliz. 2, c. 34) (see above, p. 313), and the Rating and Valuation Act, 1959 (7 & 8 Eliz. 2, c. 36) (see above, p. 314), received the Royal Assent on May 14, 1959.

PUBLIC AUTHORITIES

Agricultural Land Commission

Accounts of management and farming, 1957–58, have been published; together with the report of the Comptroller and Auditor General thereon (H.C. 198 of 1958–59).

Ancient Monuments Boards

Reports for 1958 have been published (H.C. 191 of 1958–59).

British Phosphate Commission

Report and accounts for 1957–58 have been published (Cmnd. 715).

Central Land Board

The Central Land Board (Dissolution and Transfer of Functions) Order, 1959, has been made.

This Order in Council is made under section 63 of the Town and Country Planning Act, 1954, as extended by section 63 of the Town and Country Planning (Scotland) Act, 1954. It dissolves the Central Land Board and transfers to the Minister of Housing and Local Government and to the Secretary of State for Scotland respectively the functions of the Board under the enactments set out in clause 3 of the Order. These functions relate principally to—

Payments in respect of development value under Part I of the Town and Country Planning Act, 1954, and Part I of the Town and Country Planning (Scotland) Act, 1954.

Recovery of such payments in certain cases from acquiring authorities. Issue of certificates of unexpended balances of established development value.

Assessment and collection of outstanding development charges.

Assessment of outstanding claims for loss of development value.

The Order in Council also contains other incidental, consequential and supplemental provisions necessary for the transfer of functions (S.I. 1959 No. 530).

Herring Industry Board

Accounts have been published for 1957–58; together with the report of the Comptroller and Auditor General thereon (H.C. 130 of 1958–59).

Iron and Steel Realisation Account

Accounts of the transactions 1957–58 have been published; together with the report of the Comptroller and Auditor General thereon (H.C. 143 of 1958–59).

National Assistance Board

Report has been published for 1958 (Cmnd. 781).

Sugar Board

Accounts have been published for 1956–58 balance sheet at June 30, 1958, together with reports of Comptroller and Auditor General thereon (H.C. 147, 157 of 1958–59).

Financial year. The Sugar Board (Financial Year) Order, 1959, provides that the second and subsequent financial years of the Sugar Board established under the Sugar Act, 1956, shall be the period July 1 to June 30 inclusive (S.I. 1959 No. 685).

White Fish Authority

Accounts have been published for 1957-58; together with the report of the Comptroller and Auditor General thereon (H.C. 160 of 1958-59).

PUBLIC HEALTH**Medical Officers of Health and Public Health Inspectors**

The Public Health Officers Regulations, 1959 (together with the Public Health Officers (Port Health Districts) Regulations, 1959), replace with amendments the Sanitary Officers (Outside London) Regulations, 1935 and 1951, and the Sanitary Officers Order, 1926, which with the Sanitary Officers (London) Regulations, 1935 and 1951, applied only to London.

The regulations apply to local authorities in England and Wales, including London, and to the port health authority of the port of London.

Under the former regulations compliance with certain provisions was a condition of the right of councils of county districts and metropolitan boroughs to receive from county councils payments towards the salaries of medical officers of health and public health inspectors. These payments were abolished by section 57 of the Local Government Act, 1958. Otherwise the regulations substantially repeat the provisions of the former regulations as to the qualifications, duties and tenure of office of medical officers of health and public health inspectors.

The regulations make applicable to all local authorities the requirement that a public health inspector shall perform his duties under the general direction of the medical officer of health.

In addition to the qualifications prescribed for public health inspectors under the regulations now repealed the regulations provide for the recognition of certificates and diplomas of the Public Health Inspectors Education Board and certificates of the Royal Sanitary Association of Scotland and require that a public health inspector appointed by a local authority employing only one public health inspector shall have had at least two years' previous experience (S.I. 1959 No. 962).

The Public Health Officers (Port Health Districts) Regulations, 1959 (together with the Public Health Officers Regulations, 1959), replace with minor amendments the Sanitary Officers (Outside London) Regulations, 1935 and 1951. They apply to all port health authorities in England and Wales except the port health authority of the port of London.

Under the First Schedule to the Public Health Act, 1936, compliance with the regulations is obligatory so far as they relate to the qualifications and duties of medical officers of health but otherwise compliance with the regulations is a condition of the right of port health authorities to receive from county and county borough councils payments towards the salaries of medical officers of health and public health inspectors.

In addition to the qualifications prescribed under the preceding regulations for public health inspectors the regulations provide for the recognition of certificates and diplomas of the Public Health Inspectors Education Board and certificates of the Royal Sanitary Association of Scotland and require that a public health inspector appointed by a port health authority employing only one public health inspector shall have had at least two years' previous experience (S.I. 1959 No. 963).

REMEDIES**Certiorari**

A company made an application for a patent which was opposed by the owners of a prior patent. The Superintendent Examiner ordered the patent applied for to be sealed with a reference to the prior patent. The Patents Appeal Tribunal reversed the decision. The owners of the prior patent

applied for certiorari, on the ground that there was an error of law on the face of the record, in that the tribunal had misconstrued the specification. The House of Lords (Lords Morton, Reid, Tucker, Somervell and Denning) *held*, dismissing an appeal from the Court of Appeal, that although an order of certiorari lay to the Patents Appeal Tribunal, the court, in determining whether or not there was an error on the face of the record, could not consider the evidence which had been given before the tribunal in order to construe a document which formed a part of the record. *BALDWIN & FRANCIS v. PATENTS APPEAL TRIBUNAL* [1959] 2 W.L.R. 826; [1959] 2 All E.R. 433.

Injunction

The defendants sold flowers each Sunday from a stall outside a cemetery in Manchester. The stall projected about two and a half feet from the railings across a footpath which was between fifteen and sixteen feet wide. The defendants had frequently been convicted (for their flower selling activities) under the Manchester Police Regulations Act, 1844. The Attorney-General applied for an injunction to restrain the defendants. *Held*, that although the defendants were guilty of the offences under the 1844 Act, their activities caused no injury to the public, and that, in the exercise of the court's discretion, an injunction would not be granted: *Att.-Gen. v. Harris* [1959] 3 W.L.R. 205; [1959] 2 All E.R. 393, Salmon J.

SCOTLAND

Report

Industry and employment in Scotland and Scottish roads report, 1958, has been published (Cmnd. 706).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 311), LOCAL GOVERNMENT (above, p. 313), NATIONAL HEALTH SERVICE (above, p. 316), NATIONALISED INDUSTRIES (above, p. 320).

SUBORDINATE LEGISLATION

Parliamentary proceedings

Select Committee on Statutory Instruments (House of Commons). On April 14 and 28, May 5, June 9 and 23, 1959, the Committee considered 43, 14, 10, 53, and 19 instruments respectively and resolved that it was unnecessary to draw the special attention of the House to them. The Committee asked for memoranda from Government Departments in respect of eight instruments.

In their Second Report, the Committee drew the special attention of the House to the Food Hygiene (Scotland) Regulations, 1959 (S.I. 1959 No. 413), on the ground that its purport calls for elucidation (H.C. 5-X, 5-XI, 5-XII, 5-XIII, 5-XIV).

Special Orders Committee (House of Lords). In the Third, Fourth, Fifth, Sixth, Seventh, and Eighth Reports, the Committee examined nineteen statutory instruments. The Committee found that three instruments raised important questions of policy or principle, and could not be passed by the House without special attention, that seven were not founded as precedent, but that all could be approved without further special inquiry (H.L. (55) (77) (87) (110) (126) (128) of 1958-59).

Special procedure orders

Debate. On April 23, 1959, on a motion for annulment, special procedure orders were discussed by the House of Commons (604 H.C. Deb. 727-754).

TOWN AND COUNTRY PLANNING

Agricultural land

The Court of Appeal (Lord Evershed M.R., Romer and Pearce L.JJ.) reversing decision of Roxburgh J. *held* that a condition in a planning permission granted by the council under section 14 (1) of the Town and Country Planning Act, 1947, on December 5, 1952, to build a pair of semi-detached cottages within the metropolitan green belt, was, although couched in vague and ambiguous terms, not of such a nature as to invalidate it on the grounds that it was *ultra vires*. *FAWCETT PROPERTIES v. BUCKINGHAM C. C.* [1959] 2 W.L.R. 884; [1959] 2 All E.R. 321.

Enforcement notice

Challenging notice. On an appeal under section 23 (4) of the Town and Country Planning Act, 1947, the justices have power to determine whether development, within section 12 of the Act, has taken place.

Per Lord Evershed M.R.: "I can see no sufficient ground for supposing that the competence of the justices to inquire, aye or no, into the fact of development should be regarded as a subject-matter inappropriate for their jurisdiction. Rather, and as a matter of principle, I should prefer the view that clear words must be found to justify an ousting, upon such a matter, of the jurisdiction of the courts."

In June 1956 a company placed an automatic coin-operated ice-cream sales machine on the forecourt outside its premises, which it used as an ice-cream parlour. There were holes in the base of the machine whereby it could be bolted to the ground when in use; the refrigeration plant in the machine was operated by electricity supplied through a cable. No planning permission was sought or obtained for the machine. By an enforcement notice, served by the local planning authority, the company was required to remove the machine. The company appealed to the justices against the notice under section 23 (4) of the Town and Country Planning Act, 1947. The justices held that there had been no development within section 12 (2) of the Act and quashed the notice. On appeal by the local authority, the Divisional Court (Lord Goddard C.J. dissenting) held that the justices had no jurisdiction under section 23 (4) of the Town and Country Planning Act, 1947, to determine whether in fact development within section 12 of the Act had taken place. The company appealed. *Held*, allowing the appeal, that the justices were entitled to inquire whether development had taken place and, having found that there was no development, they were entitled to quash the notice: *EASTBOURNE CORPORATION v. FORTES ICE CREAM PARLOUR* (1955) [1959] 2 W.L.R. 630; [1959] 2 All E.R. 102.

A local planning authority served an enforcement notice on the owners and tenants of a caravan site. The justices quashed the notice on the ground that an increase from eight to twenty-seven caravans on a one and a half acre site was not a material change of user, and that, therefore, it did not constitute "development" within section 12 of the Town and Country Planning Act, 1947. The Divisional Court, allowing an appeal, held that the justices had no jurisdiction to quash the notice. *Held*, allowing an appeal by the owners and tenants, that the justices had jurisdiction, and that the question whether there was development was one of fact properly decided by the justices: *GUILDFORD R. D. C. v. FORTESCUE*; *SAME v. PENNY* [1959] 2 W.L.R. 643; [1959] 2 All E.R. 111, C.A. (following *Eastbourne Corporation v. Fortes Ice Cream Parlour* (above)).

Maintenance of waste land. The power of a local planning authority under section 33 (1) of the Town and Country Planning Act, 1947, to require the owner or occupier of waste land to abate any injury to adjoining land is limited to cases where the waste land is outside the curtilage of a building belonging to the owner or occupier.

S. owned land which, until 1955, he used as a sawmill. In 1955 the use of the sawmill was discontinued and S. let the land to a company who used the land for breaking up vehicles. In 1957 the local planning authority served a notice on S. purporting to be a notice under section 33 of the Act of 1957, requiring S. to remove all cars, car bodies and machinery "from the open land within the curtilage" of the premises. *Held*, that the notice was a nullity since, on its true construction, s. 33 must be limited to cases where the "garden, vacant site or other open land" was not within the curtilage of a building, as the land used for breaking up, in the present case, was.

Per Lord Parker C.J.: "I appreciate that that may give rise to questions in some cases as to what is, and what is not, within the curtilage of a building, and indeed . . . it may be that the curtilage is not the right test, but that the test is whether, as in the Use Classes Order of 1948, the land is occupied with a use for the same purposes as the building"; *STEPHENS v. CUCKFIELD R. D. C.* [1959] 2 W.L.R. 480; [1959] 1 All E.R. 635, Lord Parker C.J.

Misstatement in recital. A statement in an enforcement notice that the use of the land has been changed without the grant of permission required in that behalf will, if the necessary permission was granted even for a limited period by the Town and Country Planning General Development Order, 1950, invalidate the notice.

A landowner began to use his land as a caravan site. He applied for permission for the change of use, which was refused. An enforcement notice was then served requiring him to discontinue the new use. He did not comply with it and was prosecuted under section 24 (3) of the Town and Country Planning Act, 1947. His defence was that the enforcement notice was invalid in that it recited "that development consisting of a material change of use has been carried out on the land . . . without the grant of permission." *Held*, that the enforcement notice was a nullity and accordingly no offence had been committed; the recital was erroneous, in that consent for twenty-eight days' use as a caravan site in each year was given by the Order of 1950; *CATER v. ESSEX COUNTY COUNCIL* [1959] 2 W.L.R. 739; [1959] 2 All E.R. 213, D.C.

See also *PUBLIC AUTHORITIES* (above, p. 324), *TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS* (below, this page).

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

National Insurance and Industrial Injuries Tribunals

Determination of Claims and Questions. The National Insurance (Determination of Claims and Questions) Amendment Regulations, 1959, amend the National Insurance (Determination of Claims and Questions) Regulations, 1948, in order to give effect to Regulation 5 (3) of the National Insurance (Contributions) Amendment Regulations, 1959, under which certain disqualifications applicable to claims to benefit are to apply also to the right to be excepted from liability to pay and credited with contributions because of unemployment or sickness. This latter Regulation implements a recommendation made by the National Insurance Advisory Committee in their Report on the Question of Contribution Conditions and Credits Provisions (Cmd. 9854).

Regulation 3 provides that questions whether a person would, if otherwise entitled thereto, have been disqualified for receiving unemployment or sickness benefit by virtue of subsection (2) or (3) of section 13 of the National Insurance Act, 1946, or of regulations made thereunder, shall not be decided by the Minister; instead they are to be decided by insurance officers, local tribunals or the Commissioner in the same way as other questions as to the right to benefit. Regulation 2 makes a minor and consequential amendment.

The preliminary draft of these Regulations was submitted to the National Insurance Advisory Committee in accordance with section 77 of the National Insurance Act, 1946, and their report thereon, dated April 3, 1959, is contained in the House of Commons Paper No. 192 (Session 1958-59) published by Her Majesty's Stationery Office (S.I. 1959 No. 848).

National Service

Umpire's decisions. Five selected decisions by the Umpire in respect of applications for postponement of liability to be called up for service under the National Service Acts, 1948-55, have been published by the Ministry of Labour and National Service (N.S. Code 2, Pamphlet No. 1/59, containing decisions Nos. 390/58, 446/58, 21/59, 26/59, 36/59 N.S.).

Planning appeals

The Ministry of Housing and Local Government has issued a circular enclosing a copy of the first issue of a new series of selected planning appeals: Selected Planning Appeals, 2nd Series, Vol. 1 (H.M.S.O. 75-70-1) (Circular No. 40/59).

Police Appeals

The Home Secretary has stated that from 1953-58, fifty-six appeals under the Police (Appeals) Act, 1927, were decided; in seven cases, an oral inquiry was held (603 H.C. Deb. 89-90, April 15, 1959; see also 606 H.C. Deb. 41-42, June 4, 1959).

Transport Tribunal

The interim decision has been published on the British Transport Commission (Passenger) Charges Scheme, 1959 (H.M.S.O. 88-818).

The proceedings have been published of the 22nd Day in the matter of the application of the British Transport Commission; to confirm the B. T. C. (Passenger) Charges Scheme, 1958 (H.M.S.O. 88-817-22).

Tribunals of Inquiry

On May 14, 1959, the House of Lords debated the value of tribunals under the Tribunals of Inquiry (Evidence) Act, 1921, for cases like the "Waters" case (216 H.L. Deb. 453-478; see above, p. 311).

See also REMEDIES (above, p. 325).

WALES

Debate

On April 23, 1959, the House of Commons debated the Report on Developments and Government Action in Wales and Monmouthshire, 1957-58 (Cmnd. 684) (604 H.C. Deb. 618-726).

WIRELESS AND TELEVISION

Debate

On June 3, 1959, the House of Lords debated the television services (216 H.L. Deb. 553-647).

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Colonial development. The Colonial Development and Welfare (Amendment) Act, 1959 (7 & 8 Eliz. 2, c. 29), received the Royal Assent on April 30, 1959. This Act amends the Colonial Development and Welfare Act, 1955 (3 & 4 Eliz. 2, c. 6), by extending until March 31, 1964, the period during which expenditure may be incurred on schemes under section 1 of the Colonial Development and Welfare Act, 1940 (3 & 4 Geo. 6, c. 40), by making a further £95 million available for such expenditure from moneys provided by Parliament and by abolishing the limit on expenditure to be made in any one year (section 1 (1)-(4)); pensions may in certain cases continue to be paid after March 31, 1964 (section 1 (2)); section 2 authorises the making of loans (not exceeding in the aggregate £100 million, nor exceeding £25 million in any one year) to colonial governments for development programmes approved before March 31, 1964, by the Secretary of State and the legislature of the territory subject to safeguards as to terms of employment and the employment of children; section 3 contains supplementary provisions as to loans; section 4 provides for territories which have become ineligible for further assistance on attaining independence and contains other minor and consequential amendments. Section 5 contains the short title and repeals. The Act and the Colonial Development and Welfare Acts, 1940 to 1955 (3 & 4 Geo. 6, c. 40; 8 & 9 Geo. 6, c. 20; 3 & 4 Eliz. 2, c. 6), may be cited together as the Colonial Development and Welfare Acts, 1940 to 1959.

The Act came into force on April 30, 1959, the date on which it received the Royal Assent.

Colonial Development Corporation. The Secretary of State for the Colonies, Mr. Lennox-Boyd, has announced the setting up of a committee of inquiry, "to examine the functions of the Colonial Development Corporation within its existing statutory framework; to consider whether any change in its financial structure is required; and to make recommendations."

He said that the Government had been considering whether the financial basis on which the Colonial Development Corporation is required to operate is the one best suited to present circumstances; and the corporation itself had, for some time, been pressing for changes in regard to particular features of its capital structure. Preliminary studies had shown that the problems involved in relating the normal requirements of Government finance to the circumstances of the corporation are complex. The Government felt that it would be of great assistance to have before it an independent report embodying wide business, financial and accounting experience.

The committee, which had been set up with the full agreement of the corporation, will be under the chairmanship of Lord Sinclair of Cleve, chairman of the Imperial Tobacco Company and a former president of the Federation of British Industries, and will include Sir Archibald Forbes, chairman of the Iron and Steel Board and a director of Spillers, Ltd., and Sir Harold Howitt, chartered accountant (603 H.C. Deb. 27-28, April 8, 1959).

The annual report and statement of accounts, 1958, have been published (H.C. 214 of 1958-59; and see 606 H.C. Deb. 36-37, June 4, 1959).

Colonial territories. The annual report of the Secretary of State for the Colonies, 1958-59, has been published. The following are some of the main points in the report.

An outstanding event of the year was the London agreement on Cyprus in February, 1959. Details of the settlement are now being worked out in London and in Cyprus, and it is intended that the Republic of Cyprus

and the two sovereign areas to be retained by the United Kingdom should come into being not later than February 19, 1960. A full description of events leading up to the signature of the agreement is contained in the report.

At the end of the *Nigerian* Constitutional Conference, which resumed in London in September, 1958, the Secretary of State announced that, if the next federal parliament passed a resolution early in 1960 asking for independence, Her Majesty's Government would agree to the federation becoming a fully independent country on October 1, 1960. In the meantime, in accordance with the decision of the conference, the Northern Region of Nigeria attained full internal self-government on March 15, 1959. A ministerial system was introduced in the Southern Cameroons in May, 1958, and, at the elections to the enlarged House of Assembly in January, 1959, the Kamerun National Democratic Party, formerly in opposition, gained a majority.

The approach of independence for Nigeria has raised the question of the future of the British trust territories of the *Southern and Northern Cameroons*, which are at present administered as part of Nigeria. A United Nations mission visited the territories, and their report, together with a supplementary report on the situation arising from elections in the Southern Cameroons, was considered by the General Assembly in February and March, 1959. The Assembly recommended that plebiscites should be held in both territories to determine whether or not the people wished to remain part of Nigeria. These plebiscites will take place in the Northern Cameroons in November, 1959, and in the Southern Cameroons between December, 1959, and April, 1960.

Sierra Leone's first all-African cabinet, over which the Governor presides, was inaugurated in August, 1958.

In East Africa, *Kenya's* new constitution came into force in April, 1958. The specially elected members were chosen by the Legislative Council sitting as an electoral college. The African constituency elected members maintained their opposition to the constitution and did not take part in the election of the specially elected members or accept office on the Council of Ministers. The emergency situation continued to improve and 8,000 detainees were released.

Tanganyika's first common-roll elections to the Legislative Council took place in September, 1958, and February, 1959. The Governor subsequently announced his intention to appoint, on July 1, 1959, a Council of Ministers in which unofficials (three Africans, one Asian and one European) will for the first time hold ministerial office. A committee is to be appointed to make recommendations on further constitutional changes.

The first ten directly elected members of the *Uganda* Legislative Council were chosen on a qualitative franchise in October, 1958. A committee has been set up to make recommendations concerning the introduction of common-roll elections in 1961. The Lukiko of Buganda has refused to fill the Buganda seats in the legislative Council provided for in the Buganda agreement of 1955, and have submitted their objections to the courts.

The first elections to the *Somaliland* Legislative Council took place in March, 1959. During a visit to the territory in February, the Secretary of State announced that, by the end of 1960, there would be an unofficial majority in the Legislative Council, and Somalis with executive responsibility in the Government. He added that, thereafter, it is the intention of Her Majesty's Government to arrange such further constitutional steps as may be necessary to lead to early self-government. Further, since Her Majesty's Government are aware of the desire expressed by many Somalis of the protectorate that there should be a closer association between the protectorate and Somalia, he said that, if, when Somalia had become independent, the Legislative Council of the protectorate formally resolved that negotiations with the Government of Somalia be instituted to determine the terms and

conditions on which a closer association of the two territories might be achieved, Her Majesty's Government would be ready to transmit this resolution to the Government of Somalia, and thereafter to arrange for negotiations of a suitable nature to take place.

Elections were held in *Aden Colony* in January, 1959, on a wider franchise than in 1955. The Federation of Arab Amirates of the South, comprising six States of the Western Aden Protectorate, was inaugurated in February, 1959, in the presence of the Secretary of State. A treaty of friendship was signed by the Federation and Her Majesty's Government.

Constitutional changes were introduced in *Northern Rhodesia* providing for an increased majority of unofficial members in the Legislative Council and for all the unofficial members to be elected on a common roll on which British protected persons with the necessary qualifications are eligible to register for the first time. Elections to the Legislative Council were held in March, 1959. As required, the Governor has appointed two Africans to the Executive Council, in which unofficials are now also in a majority.

A state of emergency was declared in *Nyasaland* in March, 1959, following incidents involving supporters of the Nyasaland African Congress which required police action. The constitutional talks which the Minister of State for Colonial Affairs had planned to hold in Nyasaland in February were consequently postponed, but the Minister visited the territory in March in connection with the emergency. A commission of inquiry arrived in Nyasaland in April, to inquire into the disturbances and the events leading up to them.

Details of the constitution of the State of *Singapore* were settled when an all-party delegation visited London in May, 1958, provision being made for the new constitution, which gives Singapore full internal self-government, being brought into force after elections to the Legislative Assembly on May 30, 1959. *Christmas Island*, in the Indian Ocean, was transferred to the Commonwealth of Australia on October 1, 1958.

His Highness the Sultan of *Brunei* and a delegation of the State Council visited London for constitutional talks in March and April, 1959. It was agreed that Brunei should have a written constitution, that there should be a new agreement between Her Majesty and the Sultan, and that arrangements should be made for the administrative separation of Sarawak from Brunei.

The Legislature of *The West Indies*, after its inauguration by H.R.H. Princess Margaret, was formally opened by the Governor-General, Lord Hailes, on April 30, 1958, and Sir Grantley Adams, formerly Premier of Barbados, was appointed the first Prime Minister of the Federation.

A new constitution for *Jamaica*, providing for full internal self-government in respect of all subjects for which the Federal Government is not responsible, was prepared and will be brought into effect in 1959. New constitutions for the *Turks and Caicos Islands* and the *Cayman Islands* will come into effect at the same time.

Following talks in London in September, 1958, certain changes are to be made in *Trinidad's* constitution, including the appointment of an extra Minister. Changes of a more fundamental nature are under consideration by a select committee of the legislature.

In *Barbados*, local government elections in March, 1959, marked the replacement of the traditional vestries by three municipal district councils.

During his visit to the *Bahamas* in April, 1958, the Secretary of State announced that the franchise would be reformed and that four new seats would be created in the House of Assembly.

In *Malta*, Ministers resigned following the breakdown of the constitutional talks in March, 1958. Representatives of Maltese political parties were invited to a constitutional conference in London, in November and December, to discuss an interim constitution, drawing its inspiration from the integration proposals, but no discussions on this basis proved possible, and the conference

ended without agreement. Her Majesty's Government reluctantly decided, therefore, to revoke the 1947 constitution, and interim arrangements were introduced in April, 1959, providing for the administration of the island by the Governor and a nominated Executive Council.

Developments elsewhere included a new treaty of friendship between Her Majesty's Government and *Tonga*, signed in August, 1958; elections to an enlarged Legislative Council held in *Mauritius* in March, 1959, and the subsequent appointment of nine unofficial Ministers to the Executive Council; and, in the *New Hebrides*, increase of the Melanesian representation on the advisory council to reach parity with the Europeans (Cmnd. 780; the above summary is based on Commonwealth Survey, C.O.I., June 23, 1959; for a debate on the future status of smaller colonial territories, see 603 H.C. Deb. 1283-1369, April 17, 1959).

Bechuanaland

Report. The report for the Protectorate for 1957 has been published by the Commonwealth Relations Office (H.M.S.O. 58-1-5-57).

Brunei

Discussions between the Sultan of Brunei and the United Kingdom Secretary of State for the Colonies on the constitution of the territory were held in London between March 23 and April 6, 1959. They follow the emergence, in recent years, of political awareness amongst the Malayan community, which forms about 49 per cent. of the mixed population (total about 75,000) of this small British protected State (land area 2,226 square miles) on the island of Borneo. At present, the supreme authority in the State is vested in the Sultan in Council. The State Council, a nominated body, the assent of which is required for the enactment of legislation and to which important questions of policy are referred, has nineteen members including the British Resident, who advises the Sultan, and is presided over by the Sultan. Proposals for a system of representative government have been under consideration in the territory for some time.

Complete agreement was reached on all the matters discussed, and the new arrangements will take the following form: His Highness, the Sultan, will promulgate (within six months after April 1) a written constitution for Brunei, which will incorporate representatives of the people in the running of the State. The 1905-06 agreement with the Sultan is to be replaced by a new agreement more in line with modern ideas. There will be an administrative separation of Brunei from Sarawak; in particular, the arrangement whereby the Governor of Sarawak is High Commissioner for Brunei will be ended, and there will be a High Commissioner in Brunei itself who will deal direct with Her Majesty's Government. The United Kingdom will be responsible for defence and external affairs; the High Commissioner will be responsible for advising the Sultan on matters connected with the government of the State, except those relating to the Moslem religion and the custom of the Malays. The post of British Resident in Brunei will disappear, and there will be a *Mentri Besar* (Chief Minister) appointed by the Sultan, who will be responsible to the Sultan for the exercise of executive authority in the State. Special consultative arrangements were agreed on for internal security (603 H.C. Deb. 31-32, April 9, 1959; Commonwealth Survey, C.O.I., April 14, 1959).

Buganda

A letter dated April 9, addressed by the Secretary of State for the Colonies to the Kabaka of Buganda, in answer to a request from the latter to the Queen for the cessation of Britain's protecting authority over the territory, was read to the Buganda Lukiko (Parliament) on April 20. It

expressed sympathy with the Buganda people's wish to preserve their individuality and ancient traditions, but put forward the view that, in the best interests of the Baganda and the other peoples of Uganda, this aim might be better achieved by "some development or evolution from the existing position" than by severance of the connection with Britain while the Uganda Protectorate was moving forward towards self-government. The Secretary of State hoped that discussions, on this general basis, might take place soon between representatives of the Buganda Government and the Governor of Uganda, and concluded his letter by expressing the hope that the Kabaka's Government would "give earnest of its good intentions to co-operate fully in the constitutional discussions . . . by resuming meanwhile Buganda's representation in the [Uganda] Protectorate Legislative Council" (Commonwealth Survey, C.O.I., April 28, 1959).

Ghana

The following is a summary of recent constitutional changes in Ghana:

The Regional Assemblies Act, passed in August, 1958, has the effect of making the Regional Assemblies purely advisory bodies. This was in accordance with the Ghanaian Government's view, published earlier in a White Paper, "that it would be wasteful, cumbersome and altogether unsound administratively to have in the proposed local government structure another tier in the form of Regional Assemblies, where would be exercised powers and functions which should normally be exercised by local authorities."

The Constitution (Repeal of Restrictions) Act was passed in December, 1958. The effect of this Act was that, whereas, under the Ghana (Constitution) Order in Council of 1957, measures amending the constitution, as set out in the Order, could only be enacted if they were supported by not less than two-thirds of all members of Parliament and by the Regional Assemblies concerned, it now became possible to amend the constitution by a simple majority of the National Assembly, and without reference of a Bill to the Regional Assemblies.

The Referendum Bill of March, 1959, provided for the holding of referenda in any part of Ghana.

The principal effects of the Constitution (Amendment) Bill of March, 1959, are as follows:

- (1) Public officers in the Foreign Service are now to be appointed on the advice of the Prime Minister after consulting the Public Service Commission, instead of, as at present, by that commission.
- (2) A number of heads of departments below the grade of Permanent Secretary are now to be appointed in the same way as Permanent Secretaries, that is to say, on the advice of the Prime Minister after consulting the Public Service Commission (at present they are appointed by the Public Service Commission).
- (3) Justices of Appeal are to be appointed on the advice of the Prime Minister, and other judges on the advice of the Prime Minister after consulting the Chief Justice. At present the Prime Minister has to consult the Chief Justice before appointing justices of appeal, and other judges are appointed by the Judicial Service Commission.
- (4) The Judicial Service Commission is dissolved and its functions transferred to the Chief Justice.
- (5) The Government will be responsible for prosecutions for offences "against the safety of the State," instead of the Attorney-General.
- (6) Regional Assemblies are to be dissolved.

Under the provisions of the National Assembly (Disqualification) Bill of March, 1958, anyone detained under the Preventive Detention Act will be disqualified from standing for election for five years after his release from detention.

A Bill to establish a "Brong Ahafo" region was passed through all stages on March 20. Under this Bill a large portion of Western and Northern Ashanti, and that part of the Northern Region which is south of the Volta River, will become a separate Region (Commonwealth Survey, C.O.I., May 12, 1959).

Kenya

In the course of an adjournment debate in the House of Commons on April 22, 1959, the Secretary of State for the Colonies outlined the British Government's aims in Kenya and made it clear that, while, as in other dependent territories, the ultimate objective was self-government, it was still not possible to foresee a date when conditions in Kenya would justify the United Kingdom giving up its responsibilities. He reviewed briefly the conditions which would be necessary for self-government and the ways in which the United Kingdom could help the people of Kenya to achieve them.

On the question of constitutional evolution, he stated his intention to convene a conference well in advance of the Kenya general election of 1960, at which the next steps in constitutional advance would be considered. He referred to the political developments which had taken place in Kenya in the past few weeks, and particularly to the emergence of a moderate, multi-racial group of members of the Legislative Council, under the leadership of Mr. Michael Blundell, formerly Minister of Agriculture. Lord Perth, Minister of State for Colonial Affairs, had spoken with members of the group during his recent visit to Kenya, and had also met members of a delegation, under the leadership of Mr. Oginga Odinga, chairman of the African constituency elected members of the Legislative Council, which visited London for talks with the Secretary of State at the end of April.

Concluding his speech he referred to the subject of land in Kenya, and informed the House that a statement of policy had just been made in the Kenya Legislative Council. The Kenya Government had announced that its aim was to secure the progressive abolition of racial and tribal land barriers, and to ensure that the basis of tenure and management of all agricultural land would, in future, be similar throughout Kenya, regardless of race and tribe, so far as local economic and ecological factors would permit (604 H.C. Deb. 555-568; Commonwealth Survey, C.O.I., April 28, 1959).

Malta

The new Malta constitution, promulgated under the authority of the Malta (Letters Patent) Act, 1959, came into force on April 15, 1959. The constitution is contained in two instruments—the Malta (Constitution) Order in Council, 1959, and the Malta Royal Instructions, 1959.

The Order in Council provides for the office of Governor, and institutes an Executive Council to consist of three *ex officio* members (Chief Secretary, Legal Secretary, Financial Secretary) and nominated members, of whom at least three must hold public office. The names of the nominated members were announced by the Governor on April 15; three official and four unofficial members have been appointed, all of whom are Maltese.

Section 14 provides that the Governor is to consult the Executive Council in all cases except the following:

- (a) Cases which are of such nature that, in his judgment, Her Majesty's Service would sustain material prejudice if the Council were consulted thereon;
- (b) cases in which the matters to be decided are, in his judgment, too unimportant to require the advice of the Council;
- (c) cases in which, in his judgment, the urgency of the matter requires him to act before the Council can be consulted; but in such cases he is to inform the Council as soon as possible;

- (d) the exercise of any power which he is empowered or required to exercise in his discretion or in pursuance of instructions from Her Majesty or on the recommendation of any person or authority other than the Council, or in respect of which it is otherwise provided that he shall not be obliged to consult the Council;
- (e) the exercise of his power to vary the death sentence.

The Governor may act in opposition to the advice given him by the Executive Council, but in that case he must report the matter and his reasons to the United Kingdom Secretary of State for the Colonies as soon as possible. The Governor has sole power to convoke the council and to submit questions to it, but if he refuses to submit a question on the request of a council member, the question and the Governor's reason must be recorded in the minutes.

The Governor has power to enact ordinances, which are subject to disallowance by Her Majesty; Her Majesty reserves to herself ultimate power to make laws for the peace, order and good government of Malta.

The remainder of the Order in Council is concerned with the judicature, the public service, and finance. The English and Maltese languages are confirmed as the official languages, and full freedom of conscience and religious worship are reiterated in Section 49.

The Royal Instructions contain mainly administrative provisions, but section 5 sets out a list of ordinances which may not be enacted without the prior permission of the United Kingdom Government (Commonwealth Survey, C.O.I., April 28, 1959).

Nigeria

Constitution. The Nigeria (Constitution) (Amendment No. 2) Order in Council, 1959, amends the Nigeria (Constitution) Order in Council, 1954, as amended, in order to make fresh provision in relation to the police. It also provides for the establishment of a House of Chiefs for the Eastern Region and a Niger Delta Development Board, and amends the provisions of the Order relating to the Western House of Chiefs and the High Court of Lagos (S.I. 1959 No. 1049).

Governor-General and Governors. The Nigeria (Offices of Governor-General and Governors) (Amendment No. 2) Order in Council, 1959, amends the provisions of the Nigeria (Offices of Governor-General and Governors) Order in Council, 1954, as amended, relating to the discharge of the Governor-General's functions by deputy and the constitution of offices in the public service of the Federation and the public service of the Eastern Region (S.I. 1959 No. 1050).

Rhodesia and Nyasaland

Nyasaland. An Order in Council was made on April 6, 1959, authorising the Secretary of State to make provision for the conduct of the commission of inquiry (S.I. 1959 No. 624).

The warrant appointing the Nyasaland Commission of Inquiry was issued by the Secretary of State for the Colonies and was published in the *London Gazette* on April 7. After naming the members of the commission, under the chairmanship of Mr. Justice Devlin, the warrant went on to direct that the commission should have power:

- (a) to examine witnesses on oath;
- (b) to call for the production of documents;
- (c) to make such rules for its own guidance and the conduct and management of proceedings before it, and as to the time and place for its sitting, as it might from time to time think fit.

The warrant further directed that the commission should be held in private and that a witness should be entitled to have his legal representative present

while he gave evidence, but that neither a witness nor his legal representative should be present while any other person gave evidence.

These latter provisions had been made, the Secretary of State explained, "in view of the paramount importance of ensuring that no witness in possession of relevant information should be deterred from giving that information to the commission through fear of subsequent victimisation" (Commonwealth Survey, C.O.I., April 14, 1959; see also 603 H.C. Deb. 347-352, April 9, 1959; 215 H.L. Deb. 753-758, April 16, 1959).

Singapore

Existing Laws. The Singapore (Consequential Provisions) Order in Council, 1959, provides that, with certain exceptions, existing laws which apply in relation to Singapore immediately before its new Constitution comes into force shall continue so to apply subject to certain adaptations and modifications (S.I. 1959 No. 871).

Protectorate. The Colonial Report, 1956 and 1957, has been published by the Colonial Office.

Tanganyika

In an address to the Legislative Council on March 17, following the completion of the territory's first elections the Governor of Tanganyika, Sir Richard Turnbull, announced the next stage of constitutional advance. It was proposed to set up a Council of Ministers on July 1, 1959, in which unofficials, including Africans, would, for the first time, be appointed to ministerial office. The new council would have twelve ministers, of whom five would be unofficials (three Africans, one Asian and one European). It would assume the functions of the present Executive Council in advising the Governor on constitutional and legislative matters. The Executive Council would continue in existence for the life of the present Legislative Council only.

The Governor also announced the terms of reference of the committee which he had undertaken to appoint after the elections to study future constitutional changes. The committee was asked:

1. To recommend changes in representations by elected members in the Legislative Council, bearing in mind that parity of representation between races is not a permanent feature of the constitution and that there must be adequate representation of the main minority communities, Europeans and Asians. The committee also examined whether the number of constituencies or their boundaries should be changed and whether there should be any change in the system of tripartite voting.
2. To recommend how many nominated members should sit in the Legislative Council and what interests they should represent.
3. To recommend whether there should be any changes in the present qualifications for candidates and voters, within the general principles of a qualitative franchise.
4. To consider whether a territorial council, composed of representatives of the chiefs and others, should be set up to advise and report on new legislation, but without having any delaying powers.

The Governor said that, when the committee's recommendations are made public, he hoped at the same time to make an announcement about further constitutional changes (Commonwealth Survey, C.O.I., March 31, 1959).

Orders in Council have been made relating to the exercise of the Governor's powers and the constitution of public offices and providing for the establishment of a Council of Ministers (S.I. 1959 No. 1047), and relating to the composition and procedure of the Legislative Council (S.I. 1959 No. 1048).

On June 2, 1959, the House of Commons, on the adjournment, debated Tanganyika (606 H.C. Deb. 137-164).

Trinidad and Tobago

Constitution. The Trinidad and Tobago (Constitution) (Amendment) Order in Council, 1959, amends the Trinidad and Tobago (Constitution) Order in Council, 1950, by substituting a Cabinet for the Executive Council; substitutes a new Public Service Commission for the existing Public Service Commission, and establishes a Judicial and Legal Service Commission and a Police Service Commission. The Order also makes some minor and consequential amendments (S.I. 1959 No. 1044).

The West Indies

On May 13 the Queen made an Order in Council and approved the draft of Royal Instructions conferring on Jamaica internal self-government within the Federation of The West Indies. The Queen also made further Orders in Council, and approved further Royal Instructions, providing for the separate government of the Cayman Islands and the Turks and Caicos Islands. Jamaica's new constitution will be brought into effect on a day to be appointed by the Governor when the necessary arrangements for holding a general election under the new constitution have been made, and when the present legislature has been dissolved. Shortly thereafter a general election will be held. The new constitutions for the Cayman Islands and the Turks and Caicos Islands will come into effect on the same day as the new Jamaican constitution, and general elections will be held in these islands also.

This advanced stage of constitutional development in Jamaica has been reached with full accord between the two main political parties in Jamaica on the one hand and between the Jamaica Government and the United Kingdom Government on the other. The changes in the dependencies also follow local consultations.

The main changes involved are described below.

Jamaica. Under the present constitution the Governor of Jamaica retains reserved executive and legislative powers and certain Jamaican Bills must be reserved for the signification of Her Majesty's pleasure, while all Jamaican laws are subject to disallowance by the Queen. The public service is the ultimate responsibility of the United Kingdom Secretary of State for the Colonies. Under the new constitution the reserved legislature and executive powers of the Governor will disappear, while the only Bills which will have to be reserved are those affecting international obligations or the royal prerogative. The power of the Queen to disallow Jamaican laws will exist only in respect of Bills affecting Jamaican Government stock which has been given the status of trustee stock in the United Kingdom. Control of the public service will be exercised by service commissions. Jamaica will then attain complete internal self-government, although her position as a unit territory of the Federation of The West Indies will remain unchanged. That is to say, the Federal Government will still retain responsibility for subjects on the exclusive legislative list, but the Government of Jamaica will be responsible for all other subjects.

The main features of the new constitution will be as follows:

- (1) the Governor will normally act in accordance with the advice of the Cabinet (as the Council of Ministers will be called) except where the matter is the responsibility of some other body (*e.g.*, the Public Service Commission) or where the constitution specifically provides for him to act in his discretion. In the last-mentioned case he will act in accordance with United Kingdom constitutional conventions where applicable;

- (2) the legislature will consist of:
 - (a) the Legislative Council consisting of eighteen members appointed by the Governor after consultation with persons speaking for the differing political points of view of groups represented in the House of Representatives; and not more than three nor less than two members nominated by the Premier (as the Chief Minister will be called);
 - (b) the House of Representatives consisting initially of forty-five members (at present thirty-two) elected by universal adult suffrage.

The constitution will provide for the number of members of the House of Representatives to vary between forty-five and sixty. The Legislative Council will be essentially a revisionary chamber with no powers to delay Bills more than a certain period of time;

- (3) the Cabinet will consist of the Premier and not less than eleven other Ministers charged with the general direction and control of the Government, who will be collectively responsible to the legislature. The Premier will be the member of the House of Representatives best able to command the confidence of the majority of members of the chamber, and the remaining Ministers will be appointed on his advice;
- (4) the existing advisory Judicial Service, Public Service and Police Service Commissions will become executive and will be responsible for recruitment, appointments, transfers, promotions, discipline and dismissals in the services for which they are responsible. The Governor will have the power to refer their recommendations back once. Officers in the public service and the police service against whom disciplinary action is taken will be entitled to appeal to the Privy Council (see (7) below), whose decision will be final. Judicial officers will have no right of appeal to the Privy Council, but a judge may be removed from office only if the Judicial Committee of the Privy Council in the United Kingdom recommends that he should be removed for inability or misbehaviour, after the matter has first been investigated by a locally appointed judicial tribunal. The members of the Police and Public Service Commissions will be appointed by the Governor in his discretion. The Judicial Service Commission will consist of the Chief Justice, the chairman of the Public Service Commission, the senior Puisne Judge, and one other judge, or ex-judge, appointed by the Governor in his discretion. The parts of the constitution relating to the assumption of executive functions by the Judicial Service, Public Service and Police Service Commissions will not become effective until a compensation scheme has been drawn up and approved by the United Kingdom Secretary of State for the Colonies to cover officers whose careers have been adversely affected as a consequence of constitutional change;
- (5) special provision is made for the posts of Attorney-General and Auditor General and Clerk and Deputy Clerk of the Legislature, and to protect these persons' tenure of office;
- (6) provision is made for the replacement in due course of the existing office of Chief Secretary by the office of Governor's Secretary;
- (7) the Privy Council will continue in existence and, in addition to acting as an appeal body from the decisions of the Police and Public Service Commissions in respect of discipline, will advise the Governor on the exercise of the power of pardon in criminal cases. The members of the Privy Council will be appointed either by Her Majesty or by the Governor in his discretion.

The Cayman Islands and the Turks and Caicos Islands are at present administered as dependencies of Jamaica, although they have not in practice been subject to the direct control of Jamaican ministers. It was considered desirable that, when Jamaica achieved full internal self-government, the constitutional position of the dependencies should be adjusted and clarified, and that their inhabitants should be given a greater share of the responsibility for running their affairs. Accordingly, the Cayman Islands and Turks and Caicos Islands Act, 1958, was passed, giving the Queen power to constitute separate governments for them by Orders in Council.

The main features of their new constitutions will be as follows:

- (1) the Governor of Jamaica will be Governor of the Cayman Islands and Governor of the Turks and Caicos Islands;
- (2) the existing Commissioners of the Islands will be restyled "Administrators." (There is one in each of the two groups of islands responsible to the Governor for day-to-day administration);
- (3) the Legislative Assembly of the Cayman Islands will consist of:
 - (a) the Administrator,
 - (b) two or three official members,
 - (c) two or three nominated members,
 - (d) twelve members elected by universal adult suffrage.
- (4) the Legislative Assembly of the Turks and Caicos Islands will be similarly constituted, except that there will be nine elected members;
- (5) the Executive Council of each of the two groups of islands will consist of the Administrator, two official members, one nominated member and two elected members. The Executive Council will normally be consulted in matters of policy, but there will be provision for dispensing with the need to consult it, or for its advice not to be followed, in certain specified circumstances. The Governor will also have a general reserved legislative power, and the Queen will have the power of disallowance;
- (6) laws enacted by the legislature of Jamaica may be applied to the Cayman Islands and/or the Turks and Caicos Islands by virtue of a special procedure provided for by the constitution.

The Cayman Islands and the Turks and Caicos Islands are part of the Federation of The West Indies, but they do not return members to the federal legislature, and federal laws do not apply to them unless they are expressly stated to do so. The relationship of the islands to the Federation will be unchanged by their new constitutions (S.I. 1959 Nos. 862, 863, 864; Commonwealth Survey, C.O.I., May 26, 1959).

The Cayman Islands (Constitution) (Amendment) Order in Council, 1959, and the Turks and Caicos Islands (Constitution) (Amendment) Order in Council, 1959, amended the principal Orders so as to clarify the circumstances in which the Governor may use the Public Seal (S.I. 1959 Nos. 1045 and 1046).

Zanzibar

On May 5, 1959, the Under-Secretary of State for the Colonies made the following statement:

"The following constitutional changes were announced by the British Resident on April 16:

- (1) An increase in the number of representative members on the Executive Council from three to five, and the intention that at least two should be elected representative members of the Legislative Council. One of the new members will represent the interests of Pemba.
- (2) An increase in the number of constituencies from six to eight, making five constituencies in Zanzibar and three in Pemba. This will raise

the number of representative members to be elected to Legislative Council from six to eight, and the number of appointed representative members will be reduced from six to four.

- (3) A reduction in the minimum age qualifications for electors from twenty-five years to twenty-one years.
- (4) A reduction in the minimum age for exemption from the literacy qualification from forty years to thirty years.
- (5) The appointment of a committee to consider the question of the extension of the franchise to women" (605 H.C. Deb. 204-205).

BOOK REVIEWS

THE CABINET IN THE COMMONWEALTH. By H. V. WISEMAN, Lecturer in Government, University of Leeds. [Stevens & Sons, Ltd. 1958. xvi and 364 pp. £2 10s. net.]

RECENT constitutional developments and experiments in the Commonwealth have received nothing like the attention they deserve, either from lawyers or from political scientists. Books have been written on the political history of individual territories; but apart from the Hansard Society's publication, *Problems of Parliamentary Government in Colonies*, and Sir Ivor Jennings's *Approach to Self-Government*, it is difficult to recall anything resembling a general study of the constitutional developments that have taken place during the last ten years. Mr. Martin Wight's invaluable survey of the colonial Legislative Council down to 1945 has had no successor. Yet the patterns of constitutional evolution that have characterised the new Commonwealth are not only of profound political importance but are also of exceptional legal interest.

This degree of indifference to what has been going on around us is more easily explained than excused. The Commonwealth is a big place and life is short. The legislative progeny of Her Majesty in Council are multifarious and multitudinous. As Sir Ivor Jennings has observed, "while the British choose to live under an unwritten Constitution, they are by far the most prolific makers of written Constitutions—for others." None of the constitutional instruments can be fully understood unless set in its political context, and the task of keeping oneself informed of political developments in so many territories is a daunting one. But the effort is well worth making. A study of the legal instruments reveals a fascinating panorama of constitutional innovation—in provisions for safeguarding the rights of minorities (and sometimes of majorities), for securing the independence of the Judiciary and the public service, for defining the organisation and functions of the executive branch of government and prescribing its relationship with the Legislature. Those provisions which deal with the Executive are of particular interest to anyone who is familiar with the British Constitution. Matters which in Britain are regulated only by convention or usage have had to be spelt out explicitly. It is not always practicable or desirable to reproduce in the Constitution of a newly independent Commonwealth country rules that have crystallised in Britain over the centuries; and where the stage of development reached by the territory concerned falls short of independence, the modifications of the rules obtaining in Britain are likely to be substantial. The diverse formulae invented by the lawyers of Great Smith Street to provide a framework for the various stages and forms of responsible government are worthy of a detailed study. Until Dr. Wiseman's book was published they had hardly been mentioned at all.

However, Dr. Wiseman, as a political scientist, is concerned less with legal draftsmanship than with political institutions and political practice. He has written a critical account of the stages by which the colonial Executive Council has developed, or is developing, into a Cabinet under a system of responsible government. His analytical narrative is made more readable by the incorporation of numerous case-studies of political and constitutional developments in individual territories, but he contrives not to lose sight of the wood for the trees. In discussing particular territories he gives due weight to the personal factor—above all, the relationships between local Ministers and, on the one hand, the Governor, and, on the other hand,

expatriate officials. Much of his material is drawn from printed sources that are likely to have been overlooked by, or even inaccessible to, his readers, and some of it has been obtained from conversations and correspondence with the men on the spot. In the result his book is not only the standard work on the modern Executive Council but a very useful work of reference on the politics of individual territories, especially in West Africa and the West Indies.

One may reasonably surmise that Dr. Wiseman often found it necessary to redraft passages in his book after he had begun to write it. Sweeping constitutional changes and dramatic political crises occur so swiftly in so many parts of the Commonwealth that it is extraordinarily difficult to paint an accurate picture of the whole scene at any given moment of time. Unfortunately for the author, the year 1957 proved especially unaccommodating, and he has hardly done full justice to some of the important developments of that year. (Incidentally, the Federation of Malaya Independence Order in Council, 1957, is not cited; at p. 25 Ghana and Malaya are referred to as colonies; and there are one or two errors in the Appendix containing details of Executive Councils at January 1, 1958.) But the general standard of accuracy is a very high one. So, too, is the quality of the author's comments on the various trends of development; though one may well feel that his views on the prospects for Cabinet government and parliamentary régimes in the newly independent Commonwealth countries may be over-sanguine. Nationalist politicians in the colonies favour the British model partly because they genuinely admire it, partly because they are fairly well acquainted with it, partly because they believe it makes for strong government, and partly because they do not want to appear to be fobbed off with an inferior article. After independence, stresses within the ruling party, separatist tendencies, strenuous opposition, popular disenchantment and other little local difficulties may lead to reappraisals. The presidential system, "guided democracy," and even outright military dictatorship, all have their allurements. And when one reads Mr. Bandaranaike's recent nostalgic observations on the once execrated Donoughmore system of committee chairmen, no deviation from the British Cabinet system seems too remote to be conceivable.

Dr. Wiseman's reputation will not, however, depend upon his success as a political prophet. It has already been securely established by this perceptive and informative book, which, it is to be hoped, will encourage further research into the governmental institutions of the emergent Commonwealth.

S. A. DE SMITH.

GUIDE TO RESOURCES FOR COMMONWEALTH STUDIES. By A. R. HEWITT.
[London: Athlone Press. 1957. viii and 219 pp. 21s. net.]

THE main purpose of this *Guide*, which has been compiled by the Secretary and Librarian of the Institute of Commonwealth Studies, University of London, is to help advanced students to find the materials available in London, Oxford and Cambridge for the study of Commonwealth affairs, particularly in the fields of history and the social sciences. The *Guide* also gives lists of institutions and organisations concerned with various aspects of Commonwealth affairs, and supplies information about facilities for Commonwealth studies available in universities in the United Kingdom. The information is well arranged and is remarkably comprehensive. Mention is made of all the main legal collections and of the relevant bibliographical guides. Those whose fields of research touch on the Commonwealth and bestraddle the frontiers between the law and other disciplines will find it a very useful work of reference.

THE CONSTITUTION OF THE FIFTH REPUBLIC. By PETER CAMPBELL and BRIAN CHAPMAN. [Oxford: Basil Blackwell. 1958. 60 pp. 4s. 6d. net.]

DURING the last few years Mr. Campbell and Dr. Chapman, of the University of Manchester, have been responsible for a number of valuable studies of French government and administration. They have now joined forces to offer a preliminary exposition of the new Gaullist Constitution. Their booklet comprises a short general introduction, a translation of and commentary on the individual articles of the Constitution, and an addendum on the electoral laws. Since it was written, several of the organic laws for which the Constitution makes provision have been enacted, and the legal framework of the Fifth Republic is gradually approaching its completion. We look forward to the publication of the fuller study on which the authors are now engaged.

S. A. DE SMITH.

THE SPIRIT OF BRITISH ADMINISTRATION AND SOME EUROPEAN COMPARISONS. By C. H. SISSON, with a Foreword by Professor W. J. M. MACKENZIE. [London: Faber and Faber. 1959. 162 pp. £1 1s.]

EVEN those who are going to dissent most strongly from Mr. Sisson should, on the strength of this book, pardon him for writing well. This is a subtle, thoughtful and highly entertaining study of the consequences of the inarticulate major premise that Mr. Sisson finds behind the agnosticism and empiricism of the higher civil service. Though the poppies in Whitehall are not for him, the civil servant, like Housman's army of mercenaries, has been recruited to save the sum of things for pay: his concern is always with the continuity of government—the service of the Crown.

Two quotations will show what Mr. Sisson has seen—and found good—in the British system: first, on the educational background proper to such a man:

"The Commissioners might be sitting in a drawing-room, so anxious are they to avoid the pedantry of suggesting that anyone should know anything in particular"—perhaps a bit hard on a candidate unused to drawing-rooms, but even Rome did not fall in a day. To the frequent call for more *droit administratif* in Britain, he replies:

"The control with us is that provided by public opinion and particularly public opinion as expressed through Members of Parliament. . . . It would not be a gain to exchange an administration sensitive to the rough tests of common sense and public opinion for one obsessed with anxiety about procedural points and the sort of figure it would cut before the judges of an administrative court."

It is fundamental to Mr. Sisson's case, of course, that an absolute executive sovereignty—today confusingly called the sovereignty of Parliament—has always been our constitutional *grundnorm*. On the other hand, "almost wherever one goes in Europe one sees the tensions and instabilities of the political régime reflected in the administration . . . an administration, considered by itself, is nothing much." Nor is an isolated legal device. In an important sense, many of the reforms that have been proposed for strengthening our administrative law are unconstitutional. In any case Mr. Sisson doubts whether the practical working of some of these foreign checks to despotism really merits the Wordsworthian enthusiasm of their supporters here.

A large part of the book deals with foreign administration. These are admirable chapters, written with clarity and wit, and even at times with sympathy. The views expressed, however, are perhaps more controversial than the text indicates.

This is an important book. The author, an experienced civil servant, has executed here a brilliant counter-attack against the theoreticians. Though we knew some of this before, Mr. Sisson has helped us to understand.

D. J. BENTLEY.

PUBLIC LAW

Winter, 1959

COMMENT

“ONLY a little one” said *The Times* of September 10, 1959, about the proposal contained in the Special Report from the Select Committee on Nationalised Industries (Reports and Accounts). The Committee heard only nine witnesses and heard them all on four days in July. But they included the Clerk of the House, the Comptroller and Auditor General, the Librarian of the House and his Senior Statistician, the Leader of the House, and the Leader of the Opposition. The Committee were considering whether they would achieve more if they were provided with additional assistance.

The Committee looked at nine possible types of assistance. The first three had been recommended by the Select Committee which, in 1953, first considered how a sessional select committee on the nationalised industries might best operate. First, then, was the proposal of the appointment of a new officer of the status of the Comptroller and Auditor General. The Committee would have none of this for it “would most probably lead, or would appear to be leading, towards a Grand Inquisition into the nationalised industries by officials acting on behalf of Parliament.” This horror having been avoided the Committee looked, secondly, at “the help of an accountant” from a firm which had no dealings of any kind with any of the nationalised industries. The Committee liked this idea and was not dissuaded by Mr. Butler’s doubt about the advisability of bringing in somebody from outside. Thirdly, the Committee did not think it would be right to ask any statutory auditor to carry out any special extra duties. Fourthly, the Committee rejected the idea of having a Treasury official. One such had been seconded to them since their beginning, but “on principle” the Committee did not like having him because the relationship between the nationalised Boards and the Departments (including the Treasury) was central to their work and such a person was on one side of the relationship. So, again, the Committee felt that their help should come from outside the Government. Fifthly, the Comptroller and Auditor General had

said that he thought he could help. The Committee rejected this offer for two reasons: first because, while he could "suggest lines of inquiry which might prove rewarding," his help could not extend to the next stage of the investigation, where the evidence of the Boards had to be checked and evaluated; secondly, because help of this kind "would, in any case, take the Comptroller and Auditor General out of his normal function." Sixthly, the Committee thought it "not impracticable" that the Librarian should take on to his staff someone suitably qualified to work for them. "Such a man might perhaps be employed at first on a temporary basis, and could possibly be appointed from the staff of a University." Possibly. Seventhly, the Committee thought they might be able to use "a trained economist." He would be able, said the Committee vaguely, "to analyse the memoranda" and "to help and advise . . . in various ways." He also would be employed "for a session at a time" but, alas, the Committee felt that his "first loyalty" might not be "to the House." (Nor even, we might add, his second loyalty, on those terms of employment.) Eighthly, the Committee considered the possibility of having their own research staff. But here the Committee agreed that since they were appointed on a sessional basis and could not commit their successors and could hold out no prospects of promotion, the job "might not therefore attract the type of person" for whom they sought. Right again. Ninthly, the Committee said they would like to have a second Clerk.

All this is most odd. We are left with the strong impression that the Committee did not really know what the "extra man" in the Library or the economist or the research staff would do. They knew, being modestly but no doubt quite justifiably conscious of their own limitations, that they needed expert advice or more information or decent interpretation of the facts presented to them in the Reports and Accounts. Their reference to the employment of a "*trained economist*" is quaint—as if they thought of him as a bloodhound to whom they would produce odd pieces of incriminating material which he would track to source. Or did they think there was a great body of charlatans about—untrained economists—and were making clear that nothing but the best was good enough for the House of Commons? Again, the research staff they thought of. This begins to look like an intelligent idea. If the administrative difficulties mentioned could be overcome—and none of them is large—it might be possible to build up, over the years, an expert staff of considerable knowledge and the idea might spread, if not thought too revolutionary, to other Select Committees. But the Committee genuinely seemed quite ignorant of how a research staff would work. They seemed to think (again) in terms of pointing the staff at some particular small

question and seeing the boys return in a few weeks, panting but triumphant, hauling the "facts" or its "report" on a sledge. How else can one explain the Committee's comment that there might be "a long period" between the end of an inquiry in one session and the setting-up of the Committee in the next "when there will be no work of any kind for the staff to do"? What do they think research is?

And is it not most strange, on this central problem of how Select Committees should adapt themselves and how modern techniques of investigation should be used, that Mr. Butler of all people could get no further than this: "I think that what we are saying is this, that in the old days a Select Committee of Parliament dealt either with political matters which, as Members, they were more than competent to deal with, or questions of procedure on which they had the expert help of the staff of the Clerks of the House, or with matters with which the Clerks were familiar. Now, we are attempting to combine politics and economics and we find, especially in a complicated field like this, that the new demands on the human brain have outstripped the traditional panoply of clerks which was provided for us; and whilst they can still give us guidance on the grounds of common sense, I, who was trained in the traditional humanities, should be quite hopeless in advising you on the details of accounts; so that it is the new world which is catching up with the old, and we therefore have to think very deeply how we can help you, at the same time preserving your integrity. This is what matters. I am not referring to your moral integrity; your independence is a better word, your independence as a Select Committee."

Think deeply by all means. But not too long. Politics and economics are no doubt difficult when combined. And we have had nationalised industries for only twelve years. But don't you think, oh Secretary of State, Leader of the House and Party Chairman, that it's time Select Committees used methods of investigation that have been current in the outside world for a very long time?

The Select Committee found a precedent. In 1921 another Committee had been appointed to inquire into the organisation and administration of the telephone service and the method of making charges, and was given power to appoint outside persons "for the purpose of obtaining special expert or scientific information, or advice." That Committee appointed an assessor and he attended the meetings and even journeyed to Scandinavia and America "in search for the comparative information which the Committee needed." This precedent produced in 1959 a devastating comment: "The services provided to the Telephone Service Committee by their assessor might not be exactly those which Your Committee need."

Still the Committee thought the idea valuable, and Mr. Butler thought it was the best conclusion.

In conclusion, the Committee left it to the House to decide whether more help should be accorded to the Committee from the staff of the House (if necessary, by augmenting it); whether the power should be given to any future Select Committee on Nationalised Industries to appoint an assessor; or whether the best thing would be a combination of both these courses. But the Committee was anxious not to rush the job. Assistance should be "on a moderate scale." And "at least for a few years to come, Committees on the nationalised industries will have to continue to feel their way very carefully."

We may assume therefore that nothing of any significance will happen. And Select Committees will happily continue to ask questions across tables as their principal method of investigation. And *The Times* will be content. For its view of the Committee's Report was that "rarely has so much fundamental good sense been talked for so long before any Parliamentary Committee." Well, well.

AUSTRALIA

The defence power of the Australian Federal Parliament (Con., s. 51 (vi)) has received a judicial construction which distinguishes between three phases of amplitude; the peace-time power, the war-time power, and the transitional power during the wind-up of a war period. In 1949, the High Court of Australia treated the "transition" period following the Second World War as substantially finished: the *Foster-Wagner-Collins* case, 79 C.L.R. 43. But there remained at least one class of legislation whose characterisation and validity were uncertain, namely, that relating to preference in employment for returned veterans. In *Illawarra District County Council v. Wickham* (1958-59) 33 A.L.J.R. 4, the High Court has now unanimously held invalid the Commonwealth Re-establishment and Employment Act, 1945-56, Part 11, Div. 2, dealing with employment preference, so far as the legislature had attempted to continue its operation into 1958. As in the earlier case, the court was saved the awkward responsibility of arriving at a particular date—which could only be arbitrary—for the ending of the legislation's effectiveness, because the Parliament had itself extended the operation of the Act for comparatively short periods at a time, and when the writ in this suit was issued had last done so in 1955. (After the writ was issued there had been a further purported extension.) Hence the court was able to say simply that, in 1955, it had no longer been a proper exercise of the transitional defence power to enact such legislation.

On the wording and history of the particular Act, the decision

was plainly right. Even without referring to the well-known political history of the legislation—unwillingly passed by a Labour government and timorously continued by Liberals under returned-soldier pressure—this was clearly not intended as a permanent feature of Australian society, but as a temporary measure to facilitate the absorption into civilian occupations of a particular batch of war veterans. The dicta, however, go somewhat further, and suggest that even by legislation plainly designed as a permanent incentive or encouragement to service in the armed forces, it would not be competent to the Commonwealth to legislate for preference in employment to discharged veterans—not even if the definition of “veteran” were so restricted as to meet the objections which Taylor J. raised to the validity of the 1945 Act when first passed; see especially the opinion of Windeyer J. on this point. The reason given is that this form of advantage to veterans involves too great an invasion of the interests of third parties; the inference is that the Commonwealth can tax citizens to pay pensions, etc., or compulsorily acquire their cherished homesteads for soldier settlement, but may not go so far as to invade employer freedom of choice and employee freedom to be chosen. This is in line with a generally stricter attitude to the construction of Commonwealth implied powers by the present court. One wonders whether this restriction does not contain as an unexpressed major premise a political opinion that such methods of encouraging enlistment in the armed forces are undesirable; however, in the case of Windeyer J., it is necessary to add to the Holmesian category of the unexpressed major premise, since his Honour sets out at length his reasons for disliking the policy both of the legislation as drafted and of any similar legislation, better drafted, but then hastens to explain that of course such considerations are irrelevant to a question of *vires*. Not unexpressed, but expressed and disavowed!

G. SAWER.

THE SOUTH AUSTRALIAN LOCAL GOVERNMENT ACT, SECTION 676

A STUDY IN THE ATTRITION OF THE RIGHTS OF THE CITIZEN

HOWARD ZELLING

INTRODUCTION

FROM 1934 until 1957 the Local Government Act of the State of South Australia (which is a comprehensive code governing all the activities of local governing bodies in this State) contained in it a remarkable section which so far as my researches have extended has no parallel anywhere in the legislation of the United Kingdom or in Australia or, so far as I know, in any of the other Dominions.¹ The section is 676 and it reads:

“676. No by-law made after the commencement of this Act in respect of which a certificate of a Judge or the Crown Solicitor is given pursuant to section 674, shall be held to be invalid by any court on the ground that it is not a by-law which is within the competence of the council to make, or that the by-law is contrary to or inconsistent with any provision in force at the date of the said certificate of this Act, of any other Act, or of any regulation made by the Governor under any Act.”

To understand the significance of the section it is necessary to have regard to certain other sections of the Act. These are sections 671, 674, 675 and 677.

Under section 671 a council may make by-laws for any purpose not mentioned in the Act (there are a large number of defined purposes for which by-laws may be made set out in preceding sections as in most Local Government Acts) so long as such by-laws are not repugnant to the Local Government Act or to the general spirit and intendment of the laws of the state.

What the latter half of this section means is not clear and the High Court of Australia in *Groom v. The Corporation of the City of Port Adelaide*² held that the section did not extend the area of

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¹ The nearest analogy would appear to be s. 31 (27) of the Queensland Local Government Act, 1936.

² 31 C.L.R. 109, the joint judgment of Knox C.J., Gavan Duffy and Starke JJ. at p. 114.

legislation with regard to the subject-matters specifically dealt with by the individual powers given in the preceding sections.

Section 674 requires every by-law after being passed to be submitted to the Crown Solicitor and if the Crown Solicitor was of the opinion that the by-law was within the competence of the council to make, he was required to give a certificate to that effect. Unless a certificate was so given the by-law could not be laid before Parliament for confirmation. If he refused to give a certificate there was a right of appeal by the council, to a judge of the Supreme Court. After the certificate was given either by the Crown Solicitor or on appeal by a judge (and no such appeal has ever been made) then the by-law was laid before Parliament under section 675 and unless a resolution for disallowance was moved within fourteen sitting days the by-law became law on the signature of the Governor.

By section 677 a by-law could be altered or repealed (*inter alia*) by a proclamation by the Governor expressly altering or repealing the by-law. This power, again so far as the writer knows, has never been used.

The result of this fasciculus of legislation was to deny the citizen all right of access to the courts notwithstanding that a number of by-laws for which a certificate has been given were undoubtedly *ultra vires* on one or more grounds and several of these gravely infringed the ordinary rights of the citizen.

HISTORY

In order to follow this remarkable piece of legislation it is necessary to go back somewhat in time. The original section was section 337 of the Municipal Corporations Act, 1890, which reads:

“337. If any citizen of a municipality desires to dispute the validity of any by-law made or purporting to be made under this Act or any other Act relating to Municipal Corporations, such citizen may apply to the Supreme Court upon an affidavit setting out the facts for a rule calling upon the Council concerned to show cause why such by-law should not be quashed for illegality and the Court may make the said rule absolute or discharge it, with or without costs as to the Court shall seem fit: Provided that no such rule to show cause shall be drawn up until such citizen shall have paid into the Supreme Court the sum of Fifteen Pounds as security for the costs of the proceedings.”

The reason for that section is sensible enough and was an enabling section in favour of the citizen. Any person who felt that

his rights were being imperilled did not have to wait until he was prosecuted. He could if he wished get a declaration from the Supreme Court that the by-law was *ultra vires* (which presumably is what the word "illegality" means in the section) and he did not then run the risk of appearing as defendant in the police or criminal court on a prosecution or indictment.

Some years after this section was enacted a belief grew up based upon a decision of the Victorian Supreme Court on analogous legislation in Victoria in *Mayor of Brighton v. Lott*,³ a decision of Mr. Justice Hood of that court in 1892, that this was the only method of attacking a by-law and that if the validity of a by-law arose incidentally in proceedings in other courts the by-law could not be questioned. This view of the law was clearly erroneous and was overruled by the Full Supreme Court of Victoria in 1902 in *Gunner v. Holding*.⁴ The Full Court's decision was followed in South Australia by Mr. Justice Homburg of the South Australian Supreme Court in *Bishop v. Deverix*.⁵ In those days a judge of the Supreme Court could and occasionally did sit as judge of the local court of Adelaide (a local court has a jurisdiction rather more extensive on the civil side than that of an English county court) and whilst so sitting he held that the section 337 of the Act of 1890 above referred to did not preclude him from considering the validity of the by-law then in question.

In 1914 the government of the day proceeded to amend section 337 to read as follows:

"337. (1) Any person who desires to dispute the validity of any by-law made or purporting to be made under this Act or any other Act relating to Municipal Corporations may apply to the Supreme Court, upon an affidavit setting out the facts, for a rule calling upon the Council concerned to show cause why such by-law should not be quashed, either wholly or in part, for illegality.

(2) The Court may make the said rule absolute or discharge it with or without costs, as to the Court seems fit.

(3) No such rule to show cause shall be drawn up until such person has paid into Court the sum of Fifteen Pounds, or such smaller sum as the Court or a Judge thereof directs, as security for the costs of the proceedings.

(4) No such by-law shall be challenged or disputed in any other manner."

³ 14 A.L.T. 91.

⁴ 28 V.L.R. 303.

⁵ 1908 S.A.L.R. 122.

The Minister in charge of the Bill gave no reasons for the change and there was no debate in either House.⁶

This was a clear departure from the spirit of the earlier law. The effect was that if the question of the validity of a by-law arose in proceedings in any inferior court, either civil or criminal, the matter had to be adjourned until the party disputing the by-law went to the Supreme Court under the new section 337 and challenged the by-law. The result was that in some cases the inferior court's proceedings had to be adjourned whilst this was done. This was the position during the period of twenty years during which the law remained as it was enacted in 1914, *i.e.*, until the passing of the comprehensive code of 1934 to which I shall turn next. There were ten such applications to the Supreme Court, one on the average for every two years during the period, for a declaration as to the validity or invalidity of a by-law, one in 1915, one in 1919, two in 1920, one in 1925, two in 1926, two in 1927 and one in 1933.

In 1934 the legislature was so alarmed by this so-called "flood" of litigation in the Supreme Court that they decided to destroy the rights of the citizen altogether.

In the House of Assembly (the Lower House) the new sections passed without any debate. In the Legislative Council (the Upper House) there was a substantial debate as to whether or not section 676, the section which takes away the right of access to the courts, should not be struck out.⁷ I reproduce hereunder a portion of the debate in the Upper House which incidentally shows that Houses of Review are neither as outmoded nor as useless as their opponents claim them to be—

"Clause 676—'Validity of certain by-laws.'

The Hon. R. C. Mowbray—I oppose the clause. Clause 674 assumes that the local body will take every reasonable precaution to assure the validity of a by-law. It is a proper safe-guard against vexatious litigation. This clause, however, makes the Crown Solicitor the supreme legal authority from whom there is no appeal. He may be wrong. This clause cuts away every ground upon which any person might challenge a by-law. We should not deny any man the right to challenge the validity of any law or by-law. To delete this clause would have no effect upon clause 674 or any of the following clauses.

The Hon. G. Ritchie—The present law acts in this way. Under the Municipal Corporations Act a by-law may be challenged at any time in any Court. Under the District

⁶ *S.A. Parliamentary Debates*, 1914, pp. 762 and 1632.

⁷ *S.A. Parliamentary Debates*, 1934, pp. 496-498.

Councils Act a by-law can be challenged only by proceedings in the Supreme Court, which incidentally involves considerable expense upon litigants. It has happened in the past that certain litigants have embarked on wholesale breaches of the by-law. They have started proceedings in the Court and taken every opportunity for delay. The councils have laid complaints for subsequent breaches, but the courts have refused to hear the cases until the question of validity or otherwise of the by-law has been established. In one case the by-law was eventually held to be good after considerable delay, but in the meantime numerous breaches of the law had occurred. It is claimed by councils that if a by-law has been passed by the council, then scrutinised by the Crown Solicitor, then laid before Parliament and been subject to disallowance, and finally confirmed by the Governor, it should then be considered good law. It may safely be assumed that the Crown Solicitor will not give a certificate in respect of any by-law of the validity of which he is in doubt, and his decision on the matter is certainly of equal authority to that of a court of summary jurisdiction. Councils now labour under considerable difficulty and uncertainty whether by-laws can be challenged or not. This provision will remove those doubts, and it can be assumed that the interests of the public will be watched by the Crown Solicitor. The Council would be well advised to allow this clause to remain.

The Hon. R. C. Mowbray—I hope that members fully realise all that the clause implies. The Chief Secretary has shown what an extraordinary innovation it is. It seeks to take away the right of challenge and to leave the final decision to one person.

The Hon. W. G. Duncan—Only on the one point.

The Hon. R. C. Mowbray—Only on the point as to whether a by-law is valid or not, or infringes any other Act. Once the Crown Solicitor issues a certificate, which is in effect to say that the law is unchallengeable, the by-law becomes like the laws of the Medes and Persians, which are never altered for the simple reason that they are dead.

The Hon. T. McCallum—I do not like this clause and I shall vote against it. It makes the Crown Solicitor a Caesar.

The Hon. G. Ritchie—Is he likely to do anything against the interests of the Councils?

The Hon. T. McCallum—I consider it is giving too much power to one person. I would much sooner see expense incurred in having the questions decided by some other method.

The Hon. R. C. Mowbray—The Crown Solicitor is human and may be wrong.

The Hon. T. McCallum—No person is always right.

The Hon. R. C. Mowbray—The clause is asking Parliament to say that the Crown Solicitor is incapable of error . . .

The Hon. G. Ritchie—The chief object of the clause is to prevent costly litigation.

The Hon. J. Anderson—It seems to me that the clause is putting the Crown Solicitor and the local governing bodies in an invulnerable position. Where are the rights of citizens? They seem to have been entirely abrogated. They will not be able to have access to any court of law, either courts of summary jurisdiction or the highest courts of the land, if this clause is agreed to.”

The matter was then pressed to a division in which the clause was only carried by a majority of three votes; members crossing party lines to vote. In the result, for the next twenty-three years the rights of the citizen received scant consideration from councils, and the Crown Solicitor's office, which was supposed to act also in the interests of the public according to the assurances of the members of the Ministry in the Upper House, did not do more than satisfy itself whether or not the by-law was, in the opinion of the officer considering it, valid. In doing so a wider operation was ascribed to section 671 than was consistent with the decision of the High Court in *Groom v. Crocker*.⁸

ROSS CHENOWETH, LTD. v. HAYES

Councils, encouraged by this freedom from the usual salutary checks of the court in favour of liberty, proceeded to make the most of their opportunity until ultimately citizens' committees were formed to have the intolerable burden removed. Before they were ready to present their views to their representatives in Parliament a company named Ross Chenoweth, Ltd., went to the courts in an attempt to challenge one of the more outrageous applications of the by-law making power by councils.⁹ The facts were that by section 82 (1) (f) of the Building Act, 1923–1953, municipal councils were given power to make by-laws with respect to *inter alia* “the prohibiting, within localities defined by such by-laws, of the erection, construction, or alteration of or addition to any buildings or structures, except buildings or structures of classes or descriptions permitted by such by-laws, and in any case where any such by-law is made with respect to any locality, the prohibiting of the use of any land within the locality to which any such by-law applies in any manner

⁸ *Supra*.

⁹ *Ross Chenoweth, Ltd. v. Hayes*, 1955 S.A.S.R. 66.

or for any use prohibited by the by-law." The Municipality of Mitcham made a by-law in 1950 prohibiting the construction or alteration of any manufacturing building except in certain localities, and further prohibiting the use of any building or structure as a manufacturing building except in those localities. The by-law was certified by the Crown Solicitor, pursuant to section 674 of the Local Government Act, 1934-1952, and was confirmed by the Governor.

The company had erected in or prior to 1946 a valuable workshop as a manufacturing building for the business of a builder carpenter and joiner and built up a lucrative business. It continued to do so after the by-law was passed in 1950 and in 1953 it was charged with a breach of the by-law and was convicted—which in effect stopped its entire business because it would have had to move to an industrial area miles away from the area in which it had gained its customers. It appealed to the Full Supreme Court on the ground that the word "land" in section 82 (1) (f) means vacant land as appeared from a construction of the whole of the statute and therefore the by-law was *ultra vires*. It also contended that the deprivation of its rights was unconstitutional but as State Parliaments (under their various constitutions) have much wider powers than the Federal Parliament this latter argument had little hope of success.

The Full Court held that its argument was right and that the word "land" did mean vacant land and that the section of the Building Act did not authorise the making of a by-law prohibiting the use of a building which was already erected at the time of the making of the by-law. The Court after holding this to be so says at page 73 (the judgment of Napier C.J. for himself, Reed and Abbott JJ.):

"The two cardinal principles of our system are (i) the rule or supremacy of the law of the land, and (ii) the sovereignty (or quasi-sovereignty) of Parliament. Our 'freedom under the rule of law' is the right confirmed by Magna Charta—the right of every individual to 'the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land.'¹⁰ The security for that freedom is in the judicial oath, by which we are pledged 'to do right to all manner of people after the laws and usages of this State, without fear or favour, affection or ill will.' It is for Parliament to make the law, and so to delimit our freedom within the law, but Parliament itself is not above the law. The only way in which its will can be expressed is in the manner

¹⁰ Blackstone's *Commentaries*, Vol. 4, p. 424.

and form required by the law for the time being in force in the State,¹¹ *i.e.*, through an Act of Parliament.¹²

When it is acting within the scope of its plenary powers—in the due and ordinary course of legislation—Parliament can, undoubtedly, confide to subordinate agencies authority to make by-laws or the like ‘as to subjects specified in the enactment, and with the object of carrying the enactment into operation, and effect,’¹³ but it is—to say the least of it—debatable whether the State Parliament could—without an amendment of the Constitution Act—create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence.¹⁴ The criticism to which the Local Government Act is open is, alternatively, (i) that it gives the force of law to rules and regulations that have neither been passed nor authorised by Parliament in the manner and form required by law, or (ii) that it deprives the subject of the right to invoke the protection of the law against an unlawful interference with his liberty or his property, as the case may be.

Dealing with the first of these points, it seems to us that, under section 675, no by-law is given ‘the force of law’ unless it is a by-law which the enabling statute empowers the council to make. If the by-law deals with a subject committed to the control of the council, it is for the council to decide what regulations are necessary, and the by-law, when it is passed and approved, has the force of law.¹⁵ But we cannot read section 675 as authorising the council to legislate upon any subject that is not committed to it by some enabling statute.¹⁶ This view of section 675 disposes of the criticism under head (i), but, on the other hand, the necessary conclusion is that the prohibition in this by-law is an unwarranted usurpation of power—an unlawful interference with the liberty of the subject.

The difficulty that remains is under section 676, which purports to fortify these by-laws in another way, namely, by withdrawing from the courts of the State the power to say what is and what is not the law of the State. This interference with the due process of law means that the subject is deprived of what should be the basic right in a British community, namely,

¹¹ See the Colonial Laws Validity Act, 1865 (Imp.) (28 and 29 Vict. c. 63), s. 5.

¹² Dicey's *Law of the Constitution*, 8th ed. (1923), p. 403.

¹³ See *Hodge v. The Queen* (1883) 9 App.Cas. 117 at p. 132.

¹⁴ *R. v. Burah* (1878) 3 App.Cas. 889 at p. 905; *Re the Initiative and Referendum Act* [1919] A.C. 935 at p. 945.

¹⁵ *Slattery v. Naylor* (1888) 13 App.Cas. 446 at pp. 452–453; *Institute of Patents Agents v. Lockwood* [1894] A.C. 347 at p. 365.

¹⁶ *Minister of Health v. The King* (on the prosecution of Yaffe) [1931] A.C. 494 at p. 515.

the right to invoke the aid of an impartial tribunal for his protection against an unwarranted, and, in that sense, an unlawful interference with the rights given to him by the law under which he lives.

The situation which results is curious and disturbing. If the by-law had followed—or if it should be altered (under section 677) to follow—the language of the Building Act (*i.e.*, by prohibiting the use of ‘land’) we should have to give the word ‘land’ the meaning that it has in the statute, but in this case our hands are tied, and we are obliged to stand by, while the process of our court is used for the purpose of oppression under the colour of a legal judgment.”

The Full Court after reminding the appellant that it had the opportunity of a petition of grace to the Governor given it by the general law goes on to say at page 75:

“There are two observations that we are disposed to add. In the first place, we have no doubt that the provisions of the Local Government Act were framed upon the view that the certificate of the Crown Solicitor would be a sufficient safeguard against illegality or unreason. Generally speaking, we have no doubt that it is, but, in this connection, it is not out of place to stress the difference that there must always be between an extra-judicial opinion, given as this certificate must be given, and a judicial decision. When a judicial decision is given, the question has arisen, the parties have been heard, and the implications of the decision can be—more or less clearly—envisaged. The certificate of the Crown Solicitor must be given without any of those advantages, and we know how his opinion must necessarily be taken. It would be a physical impossibility for the Crown Solicitor to give his personal attention to all the multifarious matters on which his opinion is required. In the very nature of things the proposed by-law must be referred to a subordinate for report, and the probabilities are that if there happens to be a precedent for a by-law in the same or similar terms, the certificate will issue more or less as a matter of course. It is, in the highest degree, unlikely that the certificate granted in this case involved any critical examination of the various statutes expressed to be thereunto enabling, and still less likely that the question debated before us was ever considered or foreseen. If it had been foreseen we should think that the Crown Solicitor would have regarded it as calling for consideration by a Judge. So far as we are aware section 674 (4) has never been used.

The other observation that we make, is in the nature of a warning with respect to section 675, which gives 'the force of law' to any by-law when it has been certified and approved. We think that it should be clearly understood that his scheme imposes upon the Crown Solicitor the responsibility for certifying that the by-law is not only upon a permitted subject, but that it is such a reasonable by-law as the Executive should approve. Rightly or wrongly, we are under the impression that by-laws have been certified and approved upon the view, that 'the certificate ought not to be withheld where there is a precedent' for a by-law in the same or similar terms, and that, 'in any event, the courts can be trusted to see that the by-law is administered reasonably.' The warning that we feel bound to give is that, if the by-law has the force of law, the courts are bound to enforce it according to the intention that appears upon the face of the law. Any reliance upon our discretion, where the law allows us no discretion, is likely to be disappointed.

For the reasons that we have given, we think that the by-law was not within the authority of the statute, under which it purports to be made, but that section 676 of the Local Government Act precludes us from giving effect to that opinion, and that the appeal must, therefore, be dismissed."

The decision of the Full Court had been foreshadowed several years before by an article by Mr. W. A. Norman, who was a solicitor for a very large number of local governing bodies in South Australia, entitled "Invulnerability of Local Government and Building By-laws in South Australia."¹⁷ Mr. Norman was a man who had spent a lot of time in the study of local government law and was usually regarded as the outstanding expert in this field in South Australia. He said:

"Whilst no one questions the bona fides of the Crown Solicitor, it is at least fair to say that he has passed some by-laws which many practitioners would have thought exceeded the competence of the Council.

This appears to be another instance of 'the new despotism' and one wonders whether the Parliamentarians who passed the section realised the power which they had conferred on the Crown Solicitor and Local Governing bodies."

REPEAL

The Local Government Act next came before the House on an amending Bill in 1957 and on that occasion Mr. Robin Millhouse,

¹⁷ 22 A.L.J. 509.

M.P., a young lawyer on the Government side of the House but not a member of the Government, moved that section 676 of the principal Act be repealed. The answer of Sir Malcolm McIntosh, the Minister in charge of the Bill, is both interesting and revealing.¹⁸

“The Hon. Sir Malcolm McIntosh—I have conferred with some members of the Opposition and of my own Party and have ascertained that a strong majority favours the amendment. That being so it is not much use kicking against the pricks. Although the Government is prepared to permit the repeal of section 676 for the time being, it does not agree that that provision has been a failure. For over twenty years there have been very few instances of injustice resulting therefrom. Indeed, the provision has saved the councils much controversy and litigation. The Government reserves the right to have this matter reconsidered at any future date if the position is abused as a result of the repeal of this section. The section was introduced about twenty years ago as a matter of law reform by the Attorney-General at the instigation of the solicitor for the local governing authorities. Certificates of validity have not been granted loosely. After a by-law had been found invalid by the High Court, on Crown Law advice it was put into shape.

Mr. Millhouse—After three years.

The Hon. Sir Malcolm McIntosh—Yes, but it was done. The Government is prepared to accept the majority decision of the Committee in respect of this amendment.”

This is the “much controversy and litigation” which went on in all the years before the section was enacted in 1934: from 1870 to 1890 by-laws were before the Supreme Court on four occasions. The citizen was successful in three cases and the council in one. Between 1890 and 1900 one such by-law came before the Supreme Court and the council concerned was successful. From 1900 to 1910 two such by-laws came before the Supreme Court and in each case the council was successful. From 1910 to 1920 four such by-laws came before the Supreme Court and in every such case the council was successful. Between 1920 and 1930 five by-laws came before the Supreme Court. The citizen was successful in three cases and the council in two. From 1930 until 1934 when section 676 was passed one such by-law came before the Supreme Court and the citizen was successful.

There were thus seventeen appeals in all to the Supreme Court over a period of sixty-four years and the citizen succeeded in seven

¹⁸ *S.A. Parliamentary Debates*, 1957, p. 1487.

and the council concerned succeeded in ten. This does not look like a wholesale interference by the court with the rights of councils.

It only remains to add that there have been no such cases before the Supreme Court in the two years since the section was repealed but from the writer's personal knowledge in his practice there have been a number of cases where councils have behaved reasonably since 1957 in cases where they used to behave most unreasonably before the section was repealed.

The facts are short and the moral simple: between 1914 and 1934 the citizen's rights were gradually whittled away with no protest until in 1934 they were lost altogether and for twenty-three years the ordinary man had to put up with injustice with no remedy. Further when they were taken away no facts were put to Parliament to enable Parliament to judge whether such a drastic remedy was justified. If the true facts as to the "flood" of litigation had been put, it is certain that the Government would never have suggested the amendment, or if they had brought it down they would never have obtained the numbers to put it on the Statute Book.

As soon as the courts were given back their power to curb the excesses of despotically minded councils the misuse of the law stopped and no more appeals to the court have been necessary for the simple reason that the councils know perfectly well that if the matter goes to court, the judges will, as always, be the guardians of the liberty of the subject.

THE AFRICAN AFFAIRS BOARD IN THE FEDERATION OF RHODESIA AND NYASALAND

A. C. MACDONALD

1. INTRODUCTION

THE Federation of Rhodesia and Nyasaland, established in 1953, comprises the British Territories of Southern Rhodesia, Northern Rhodesia and Nyasaland. Southern Rhodesia is a colony which has enjoyed qualified self-government since 1923, and Northern Rhodesia and Nyasaland are Protectorates of the Crown. Certain functions of government have been transferred to the Federation, while, in the words of the preamble to the Federal Constitution, the Territories "should continue . . . to enjoy separate governments for so long as their respective peoples so desire." The preamble also states the objects of the Federation: "to foster partnership and co-operation between (the) inhabitants and enable the Federation when those inhabitants so desire, to go forward with confidence towards the attainment of full membership of the Commonwealth."

The Federation's population of nearly 7,500,000 people is made up of some 7,100,000 Africans, 270,000 Europeans and 32,000 people of other races. While most adult Europeans are enfranchised, the majority of Africans do not qualify for the federal vote under existing legislation. The African Affairs Board is an organ of the Federal Constitution designed to protect the interests of Africans in the federal sphere. However, before the functions of the Board can be understood, it is necessary to consider other provisions of the Constitution.

2. LEGISLATIVE POWERS WITHIN THE FEDERATION

The first point to note about the Constitution of the Federation is that it was annexed to an Order in Council, made under an enabling Act of the United Kingdom Parliament—the Rhodesia and Nyasaland Federation Act, 1953.¹ What the United Kingdom did, it can undo, and Article 29 (7) of the Constitution saves any power of Her Majesty conferred by an Act of that Parliament to legislate for the Federation:

* The author is a Resident Magistrate in Nyasaland.

¹ 1 & 2 Eliz. 2, c. 30.

which power could extend, of course, to revoking the Constitution in whole or part. However, by an agreement reached between the Federal Prime Minister and the present British Government in 1957, that Government recognised a convention by which the power of the United Kingdom Parliament to legislate will be exercised only at the Federal Government's request.

Such a convention might not be recognised by subsequent governments, and following the review of the Constitution which must take place between 1960 and 1963 and which is discussed below, the United Kingdom Government might feel bound to amend the Constitution.

Federal legislative powers

However, the chief limitation on the power of the Federal Government is the restricted sphere of its legislation compared with that of the Territorial Governments. Thus Article 29 (1) gives the Federal Legislature power to make laws in respect of any matter included in the Second Schedule to the Constitution and any matter incidental thereto. Complementarily, paragraph 4 of the Article prevents the legislature from making any other laws than those contained in the Second Schedule. Further, paragraph 5 makes void any provision of any law which at the date of its making is not within the legislative competence of the legislature.

The Second Schedule contains, first, the "Federal Legislative List (being in relation to any territory matters with respect to which the Federal Legislature has, and the legislature of the Territory has not, power to make laws)." The more important Acts passed by the Federal Legislature under this list have been the Aviation; Citizenship; Customs and Excise; Immigration and Posts and Telegraphs Acts. The Education Act dealt with the education, other than the higher education, of non-Africans. Although the Federal Legislature can legislate for the higher education of all races, the primary and secondary education of Africans is specifically excluded. Also under the authority of this list, the Federation carries out such external relations as are entrusted to it by the United Kingdom Government, and, through its power to control imports and to promote and control exports, exercises general direction over the economic affairs, trade and industry of the Federation. Part II of the Schedule contains the "Concurrent Legislative List (being in relation to any Territory, matters with respect to which both the Federal Legislature and the legislature of that Territory have power to make laws)." Under this list the Broadcasting; Census and Statistics; Deportation; Electricity; Hire Purchase; Prisons and other Acts have been passed.

Quite apart from the matters excluded by the Second Schedule under Article 29, Article 30 prevents the legislature from making laws with respect to trade unions and like associations, and with respect to certain employment disputes. Further, under Article 33 the legislature cannot alter or supersede the laws of the Territorial legislatures as to the acquisition of "African Trust Land" (trust land and other land reserved for Africans).

By Article 31 the legislatures of Northern Rhodesia and Nyasaland can add certain matters to the Concurrent Legislative List, but these are three specified matters, the most important of which is non-African agriculture. African agriculture in no territory is within the legislative competence of the Federal Legislature.

Thus there is the paradox in the name "African Affairs Board" that the matters generally termed "African (or native) Affairs"—the administration (including local government) and education of Africans, African agriculture and land—are not matters within the federal sphere.

Having considered the limitations to the federal legislative power, the composition of the Federal Legislature will now be examined. Then an account of the course of its legislation will be given, with particular reference to how far and in what manner the Federation can increase its power by amendment of the Constitution.

The Federal Legislature

The Constitution provides for a single-chamber Assembly, which, as enlarged by the (Federal) Constitution Amendment Act of 1957, comprises:

- (i) forty-four "elected members" (divided among the three Territories);
- (ii) eight "elected African members" (divided among the three Territories);
- (iii) four "specially elected African members" (divided between Northern Rhodesia and Nyasaland);
- (iv) one "specially elected European member" (from Southern Rhodesia) and two "specially appointed European members" (one each from Northern Rhodesia and Nyasaland), all "charged with special responsibilities for African interests."

The Speaker is not a member of the Assembly.

In the present Assembly all the "elected members" are Europeans. There are a number of reasons for this: there is a predominantly European electorate, no broadly multi-racial political parties and the African party in Northern Rhodesia and Nyasaland,

the African Congress, boycotted the election, the first conducted under the new franchise.

A feature of the Constitution added by the amending Act is that as Africans take their place among the "elected members," the number of these members is increased accordingly, while a corresponding decrease takes place in the number of members in other categories. Of course, the effect of this provision depends on whether and in what manner new constituencies are added for the new "elected members" and the then composition of the General Roll.

The Constitution originally contained only transitional provisions for the election of members to the Assembly. These have been replaced by the (Federal) Electoral Act, 1958, which established two rolls of voters. Every voter must be an adult, be a citizen of the Federation or a British Protected person, have lived in the Federation for two years or more, and be able to speak, read, write and understand English. The additional qualification for the General Roll is a property qualification, or a lower property qualification linked with a higher educational standard. Most Europeans qualify for the roll. For the Special Roll, a lower property qualification than any in the General Roll is demanded, or a yet lower property qualification coupled with further educational attainment. To complete this brief review of the Assembly, elections thereto and the franchise, only a voter on the General Roll can vote for an "elected member." He is also able to vote for one "African elected member." A voter on the Special Roll can only vote for one "African elected member."

The ordinary course of legislation

When a Bill has been passed by the Assembly, it is presented to the Governor-General, Her Majesty's representative in the Federation. He can in Her Majesty's name and on her behalf assent to or withhold assent from a Bill presented to him; or else he can reserve the Bill for the signification of Her Majesty's pleasure. Now in the main, the powers exercised by the Governor-General under the Constitution must be exercised in accordance with the advice of an Executive Council, consisting of the Prime Minister and certain other Ministers of the Federal Government. But the effect of Articles 39 and 24 is that in relation to Bills his powers are not subject to this advice.

Even though assented to by the Governor-General, Her Majesty may disallow any Act within twelve months after assent.² "Her Majesty" in this and other contexts means, of course, Her Majesty

² Article 25.

acting on the advice of the Ministers of the Government; and her pleasure is signified through a Secretary of State, usually the Secretary of State for Commonwealth Relations.

Amendment of the Constitution

There are three different procedures for amendment of the Constitution. First, any Bill prescribing qualifications for membership of the Assembly or the qualifications of voters at the election of a member requires a special procedure under Article 10. Thus the Bill must receive the final affirmative vote of not less than two-thirds of all the members of the Assembly; must be certified by the Speaker to be a Bill coming within Article 10 and must be reserved by the Governor-General for the signification of Her Majesty's pleasure.

Secondly, under Article 98, no Bill to amend the provisions of the Constitution relating to the matters with respect to which the Federal Legislature may make laws, or to amend Article 98, can be introduced in the Federal Assembly unless a draft of the Bill has been laid before the Legislative House of each of the three Territories and each of those Houses has passed a resolution that it does not object to the introduction of that Bill in the Federal Assembly.

Thirdly, under Article 97, any Bill for the amendment of the Constitution (including one introduced after Article 98 has been complied with, but excluding one within Article 10) must receive the final affirmative vote of not less than two-thirds of all the members of the Assembly, and must be reserved by the Governor-General. But if a Territorial legislature by resolution objects to such a constitutional Bill passed by the Federal Assembly, "Her Majesty shall not assent thereto otherwise than by Order in Council."³ And, further: "No order, proposed to be made for the purposes of paragraph (2) of this article shall be submitted to Her Majesty in Council unless a draft thereof has been laid before each House of Parliament of the United Kingdom and neither House has . . . resolved that the order should not be submitted to Her Majesty."⁴ So that the United Kingdom Parliament, or rather the Government of the day, can veto a constitutional Bill.

Before leaving the subject of legislation, it is of overriding importance that no convention yet exists, as with Canada and New Zealand, that Her Majesty's powers of refusing assent and of disallowance will only be exercised at the request of and with the

³ Para. 2.

⁴ Para. 3.

consent of the Federal Government. It has already been noted that a convention has been recognised by the present United Kingdom Government (but possibly only of force until the review of the Constitution) that it will not legislate for the Federation except at the request of the Federal Government.

3. THE AFRICAN AFFAIRS BOARD

Having reviewed some considerable limitations on the power of the Federal Assembly and therefore the Government, the nature and functions of the African Affairs Board can now be examined.

Nature and functions of the Board

One of the eight Chapters of the Constitution is devoted to the Board. Thus, by Article 67, the Board is established as a Standing Committee of the Assembly. The members are (a) the three European members charged with special responsibilities for African interests and (b) one African member from each of the three Territories, elected by a majority vote of all the African members of the Assembly and the European members in (a) acting together. From among the members of the Board, the Governor-General is given power to appoint a Chairman and deputy Chairman.

Article 68 provides for the Board's mode of decision, and Article 69 gives continuity to the Board after a dissolution of the Assembly until the Assembly first meets again. In addition, the Board is empowered to sit and act when the Assembly is adjourned or prorogued.

The functions of the Board are then defined. Article 70 gives the Board the first—general—function of making representations to the Prime Minister or to the Executive Council in relation to any matter (within the authority of the Federation) as the Board may consider to be desirable in the interests of Africans. Again, the Board can give to a territorial government, if requested, any assistance (particularly in the exchange of information) in relation to the study of matters affecting Africans.

By Article 71 the Board is given its second—particular—function, which is “to draw attention to any Bill introduced in the Federal Assembly and any instrument (legislation subordinate to Federal Acts) if that Bill or instrument is in their opinion a differentiating measure.” A “differentiating measure” is defined as: “a Bill or instrument by which Africans are subjected or made liable to any conditions, restrictions or disabilities disadvantageous to them or to which Europeans are not also subjected or made liable, or a Bill

or instrument which will in its practical application have such an effect."

This particular function is enlarged upon in the remaining part of the Chapter. Thus by Article 73 a copy of every proposed Bill must be sent to the Board, unless the Governor-General certifies the Bill to be urgent or one that it is not in the public interest to be published before introduction to the Assembly.

By Article 74, the Board may then at any stage of the passing of a Bill lay before the Assembly a report stating that in their opinion the Bill is a differentiating measure. Such report in itself has no further constitutional effect, but, by the following Article, the Board may present a request to the Speaker that a Bill passed by the Assembly shall be reserved by the Governor-General. When this request is conveyed to him, the Governor-General may reserve the Bill, or assent to it. To assent, he must be satisfied that it is not a differentiating measure and the reasons of the Board are frivolous, or that it is essential to the public interest that the Bill be brought into immediate operation. However, having assented, he must then send all relevant information to a Secretary of State, who, it has been noted, can signify that Her Majesty has disallowed the Act.

But it is Article 97 which confers the greatest power on the Board. This is the Article, already considered, which provides for the automatic reservation of any Bill amending the Constitution, and which enables the United Kingdom Parliament to veto the Bill if objected to by a Territorial legislature. Similarly, if the Board requests that such an amending Bill be reserved as a differentiating measure, the power of veto comes into play. Terminology here becomes confused in the Constitution, as the Bill must, of course, be reserved anyway.

It must be noted here that none of the powers of the Governor-General in relation to the Board and to Bills requested by the Board to be reserved, are subject to the advice of the Executive Council.

Occasions on which the Board has requested reservation

The Board has on two occasions requested the reservation of Bills passed by the Assembly.

The first Bill was the Constitution Amendment Bill, which, as the Constitution Amendment Act, has been referred to briefly as increasing the size of the Assembly and providing for its present and future composition. This Bill sought incidentally to enable the Federal Assembly to provide for the election of "African elected members" and the "specially elected European member" as well as the "elected members." The Bill accordingly came within Article 98, and

a draft of the Bill had been laid before each Territorial Legislative House, which had approved it. Thus the Board labelled as differentiating a measure already approved by two legislatures dominated by officials responsible to the Colonial Office, which exercises the protective duty in Northern Rhodesia and Nyasaland.

The effect of the Board's request was to bring into operation paragraph 3 of Article 97. The Labour Party in opposition in the House of Commons moved a resolution against the proposed Order in Council assenting to the Bill, which was defeated by the Government. The Bill became law in 1958 in time for the election to the second Federal Assembly.

The Board also requested the reservation of the Electoral Bill, which was complementary to the Constitution Amendment Bill in that it provided for the mode of election of members of the enlarged Assembly. The Electoral Bill was also reserved under Article 10, which meant that the Board's request did not bring into operation paragraph 3 of Article 97. Her Majesty's assent to the Bill was signified in the ordinary way through a Secretary of State.

4. THE FUTURE OF THE BOARD AND GENERAL CONCLUSIONS

It has been stated that the objects of the Federal Constitution, as expressed in the preamble, are first, "full membership of the Commonwealth," and secondly, "partnership." The first object may be said to define the proposed international status of the Federation, while the second defines the form of political organisation within it.

"Full membership of the Commonwealth" was defined by the then Federal Prime Minister in 1956 as, "that state of affairs when not only the Federation in its own sphere is independent, but also all the three Territories are no longer under any control from the United Kingdom." As for the meaning of "partnership" this is nowhere expressed in the Constitution nor is it easy to find a comprehensive definition expressed elsewhere. The word expresses Cecil Rhodes's concept of "equal rights for all civilised men," but it is hardly to be doubted that ultimately it must import universal suffrage. This form of suffrage could, of course, find expression in one of an almost infinite variety of schemes of representation and modes of election, providing if necessary safeguards for a minority race.

What has already been written shows that under the present Constitution, European electors are dominant in the federal sphere, which, whatever its proper meaning, is not what is intended by "partnership." As to "full membership of the Commonwealth," the

federal and all the Territorial governments are under forms of control by the United Kingdom. In two Territories, the government is headed by a Governor responsible to the Secretary of State for the Colonies in the United Kingdom Government, while federal authority is subject to the reservation and then disallowance or veto of its legislation.

That the Constitution is an interim one is recognised by the final Article, under which a conference must be convened between October 1960 and October 1963. The Conference will comprise delegates from the Federation, each of the three Territories and the United Kingdom, chosen by their respective governments for the purpose of reviewing the Constitution. There would seem to be no limit to the field of the review, and, as has been stated, the United Kingdom Government might feel bound to use its power of legislation to implement the recommendations of the Conference.

If it is correct that the review can be unlimited, and if the recommendation of the Conference were accepted that one or more of the Territories should be taken out of the Federation (as is advocated by the African Congress in Northern Rhodesia for that Territory and as was advocated by the African Congress in Nyasaland for that Territory before the party was banned in March 1959) then the present Federation would be dismembered. But supposing the Federation continued in being and retained the basic form of the Constitution, in what ways can it evolve and what could be the future of the African Affairs Board?

Future developments were suggested during debate on two motions before the first Federal Assembly, dissolved in 1958.

In 1956, the then Prime Minister, Lord Malvern, introduced a motion on the "Future Status of the Federal State." He proposed that "the United Kingdom Government should confer upon the Federal Government and Parliament complete independence in their own sphere only; the Constitution should be amended accordingly but only to the extent necessary to achieve this, and that simultaneously the Government of Rhodesia and Nyasaland and the Government of the United Kingdom should enter into a treaty embodying all those safeguards which at present reside within the Federal Constitution. Those provided by the Territorial Constitutions would not be affected." The proposals had in fact met with opposition from the United Kingdom Government and in the event were not pursued by the Federal Government. But even if achieved, the independence accorded to the Federation would have been of a most technical kind and would have represented no advance towards "full membership of the Commonwealth" as defined above. The intended role of the African Affairs Board was not specifically

explained, but presumably the Board would have retained its present nature and functions, derived from the treaty and not from the Constitution.

In 1958, Sir John Moffat, then Chairman of the African Affairs Board, introduced another motion on "Co-operation between Peoples of the Federation." He explained that his motion was designed to remove from Africans the fear that Europeans would continue their present domination indefinitely, and to remove from Europeans the fear that when Africans obtained a majority of the electorate and government, they would use their governing power to oppress for racial purposes. He then proposed that, at the Conference of review, "it will be necessary to define the rights and privileges of the federal citizen in [the] Constitution." These rights having been defined would be safeguarded by a body replacing the African Affairs Board; but, "where the African Affairs Board was concerned with the welfare of one race only, I wish this body to be concerned with the same aspects of all races and where the African Affairs Board was required to ask for reservation of doubtful legislation on the basis that it was differentiating, I would like this body to have the power to rule such action illegal because it is unconstitutional. . . . I am not contemplating a senate . . . nor am I considering a titleless House of Lords with powers only to delay." He called this body "for lack of a better term . . . the Constitutional Court." The body would thus exercise the present powers of disallowance and veto, and would therefore make the Federation independent in its own sphere. But, further, it was suggested that "that body should have vested in it the task of administering on behalf of Her Majesty's Government . . . the protective duty (in Northern Rhodesia and Nyasaland). By this I mean that Her Majesty's Government should normally accept the action of this court and should go against it only when it is demonstrated by a free vote in the House of Commons that they are of the opinion that action favoured by the court was contrary to Her Majesty's Government's duties as a protecting power."

A number of objections to the proposed body were made on behalf of the government. It was said that the "court," since it would combine powers of administration as well as arbitration, would bring judges into the sphere of administration. Thus another form of unelected government would be superimposed on the elected one. Further, it would inevitably come down to the elected government of the day to appoint members of the court. By the time of this debate the Constitutional Amendment Bill and the Electoral Bill had become law. The Government spokesman pointed out that, as and when African members were elected on their merits by means of the Common Voters Roll, special representation for Africans would

disappear and that would involve the eventual disappearance of the African Affairs Board. By that time political power would be vested in the hands of responsible and civilised people representative of all races, and no special body of the type suggested would be necessary.

Since that debate the Federal Government has impinged on the general, advisory function of the Board by establishing an Office of Race Affairs as a department of the Ministry of Home Affairs. The Office is designed to "ascertain how the needs and reasonable aspirations of Africans can best be served." Any federal government could use this Office to study, and receive representations on, problems affecting any race. As to the particular function of the Board in relation to legislation, the present writer suggests that it would not be necessary to replace the Board by another body, whether with multi-racial responsibilities, or even with responsibilities towards an electoral minority of Europeans.

At present, control by the United Kingdom of federal legislation can be invoked by three agencies (the Governor-General, the Board and the Legislative House of a Territory) and under a variety of procedures. It has also been shown that in the case of the Constitution Amendment Bill, procedures and agencies conflicted: the draft of the Bill was passed by resolution of each Legislative House, and no House objected to the Bill when passed, but the reservation of the Bill was requested by the Board. Now, if the Federation was independent of control from the United Kingdom in its own sphere, the office of Governor-General, at present one of real power, would have to assume a constitutional role analogous to that of the Queen in the United Kingdom Government and of other Governors-General in Dominion governments. However, control by the Legislative House of a Territory is an instrument capable of effective use in a variety of ways, and would be, ultimately at any rate when protection is relinquished in Northern Rhodesia and Nyasaland, an instrument of control from within the Federation.

Thus the procedure under Article 98, requiring the affirmative resolution of each Legislative House to legislation before it is introduced in the Federal Assembly, could be used in respect of all proposed amendments to the Constitution, at present dealt with under the varying procedures of Articles 10, 97 and 98. And it has been shown that only in relation to Bills already falling within those Articles has the African Affairs Board deemed it necessary to use its power to request reservation. Further, in respect of other special categories of legislation, the objection of one Territorial Legislative House could be used as a device to delay proposed legislation, or the objection of the Legislative Houses of two Territories could be fatal to that legislation.

There would always remain the dormant power of the United Kingdom to legislate for the Federation and to disallow its legislation, but the use of the Legislative Houses of the Territories as the effective control on federal legislation fits the pattern of future development in the Territories constituting the Federation. Thus, at present, executive and legislative power in Nyasaland is vested in the hands of civil servants responsible to the Colonial Office. It is accepted, by the Federal Government as much as by anybody, that when power is relinquished it will be to an African majority. So that the legislature of Nyasaland would be able to act on behalf of Africans. In Southern Rhodesia, Europeans are dominant, and it can hardly be visualised that they will ever have negligible representation in the Legislative House. If it were a requirement that the draft of legislation amending the Federal Constitution had to be passed by, say, a two-thirds majority of each Legislative House, the European interest in the Federation could be safeguarded by the provisions of the Southern Rhodesian Constitution.

It is therefore submitted that the objects of "partnership" and "full membership of the Commonwealth" could be achieved by the use of the Territorial Legislative House as the sole control over federal power. There would be no need for the African Affairs Board to be replaced by a body such as a "Constitutional Court."

FREEDOM ?—OR TOLERATION ?

THE PROBLEM OF CHURCH AND STATE IN THE UNITED STATES

VICTOR S. MACKINNON

It has been well said that none of us can define a pretty girl, although we all know one when we see one. It is much the same with many of the broader concepts of constitutional law. To define religious freedom, for example, we find ourselves almost inevitably drawn into describing the kinds and degrees of permissible restrictions on that freedom. Again, when freedom—of any kind—is declared to exist as of right, then our toleration of a similar right in others tends to become subordinated to an assertion of our own right. In the end, we are all hemmed in by defensive restrictions erected against opposing assertions. The question which underlies this paper, therefore, is whether, in the field of religious freedom, the American people might not have gained more in practice, by having no formal guarantee of principle.

1. THE MEANING OF "SEPARATION OF CHURCH AND STATE"

The historical approach to interpretation of the First Amendment to the United States Constitution¹ is confusing, since separation, as it is viewed today, was much less sharply demarcated in the early history of the nation, and indeed, beyond occasioning the declaration of the principle as against the Federal Government, the subject was little discussed in debate among the Founding Fathers.

The two most recent statements by the United States Supreme Court of what the principle implies are, however, quite far-reaching. They are contained in the opinions of Justices Black and Rutledge, respectively, in *Everson v. Board of Education*²:

The "establishment of religion" clause in the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one

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¹ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

² 330 U.S. 1 (1947).

religion, and all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organisations or groups and vice versa.³

The Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. . . . It secures all forms of religious expression, creedal, sectarian or non-sectarian, wherever and however taking place, except conduct which trenches upon the like freedoms of others or clearly and presently endangers the community's good order and security. . . . The Amendment was not duplicitous. "Religion" and "establishment" were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.⁴

In considering these two interpretations of religious "liberty," the first point to be disposed of is the issue raised by Justice Black's definition of "establishment" of religion—the issue of the different spheres of competence of the Federal and State governments.

2. THE MEANING OF "ESTABLISHMENT" OF RELIGION

Restricting the term "church" to its sense of "corporate institution," and taking the term "set up" to mean official participation by the government in the regulation of the affairs of that corporate institution or institutions, then Justice Black's definition of "establishment" corresponds with the literal terms of the First Amendment, so far as the Federal Government is concerned.

As far as the governments of the individual States are concerned, however, this statement has to be taken with some reserve. Before

³ 330 U.S. at 15–16.

⁴ 330 U.S. at 31–33.

the Revolution, there were established churches in ten States, and the last disestablishment did not take place until 1833, when Massachusetts disestablished its Congregational Church. As late as 1845, the United States Supreme Court held ⁵ that:

The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties: this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.

Now if we are considering "liberty" only in the sense of "liberty from," and not "liberty to," then the history of establishment might be allowed to repeat itself without too much attendant practical difficulty. But constitutional "liberty" of the individual has been an expanding concept, ever since Justice Field's dissenting opinion in the *Slaughterhouse* cases in 1873,⁶ with the emphasis on liberty to engage in an ever-widening range of new pursuits; and it is precisely in the expanding positive demands by religious groups to engage in additional activities under the head of "religion" that our greatest area of conflict arises, as will presently be shown. To attempt to analyse these conflicts in terms of "deprivation of religious liberty" is circuitously self-defeating; we are constantly returned to the problem of deciding what acts are "religious acts"; once the label "religion" attaches to the act, then any interference with it is *ipso facto* unconstitutional—as a deprivation of religious liberty. Establishment of one church as the exclusive state church would thus be unconstitutional only because it deprived adherents of sects other than the established one of freedom *to* believe in their own particular tenets.

Consequently, even if one accepts the proposition that the Fourteenth Amendment now incorporates the First, there is a real question remaining as to the extent to which the establishment clause of the First is incorporated along with its prohibitory clauses. A re-establishment of the Congregational Church by the Commonwealth of Massachusetts might not necessarily be *ex facie* invalid under the United States Constitution until some individual showing could be made of deprivation of religious "liberty."

3. THE MEANING OF "RELIGION"

Determination of what is a religious "cause," that is to say, whether any particular activity falls within the protected category of

⁵ *Permoli v. New Orleans*, 3 How. 589, 609 (1845).

⁶ 16 Wall. 36 (1873).

“religious” activities, cannot, constitutionally, be left to the discretion of an official, or official body.⁷ On the other hand, even if this determination is made by a court of law, the standard adopted is usually the majority opinion prevailing in society at the time. Thus the Supreme Court of Tennessee struck down the teaching of the theory of evolution in the public schools of that State, and was clearly influenced by general moral considerations against allowing the teaching of views or theories widely held to be irreligious.⁸

The problem of protecting a religious belief becomes more acute when the essence of the belief is the practising of a positive act which does not correspond with the general morality, and that morality is embodied in the criminal law. Thus the Mormon Church has been obliged to abandon entirely, as official doctrine, the practice of entering into plural marriages.

But although the courts will not allow persons, on religious grounds, to perform acts which injure the moral susceptibilities of other members of society, they *will* allow acts, performed in the name of religion, which hurt society in its pocket. The indictment in *United States v. Ballard*⁹ charged the respondents with conspiracy to use the mails to defraud, by false statements of their religious experiences, which were alleged not, in fact, to have occurred. As the “I am” movement, they professed powers of healing and divine revelation, and much of the propagation of their ideas was done through the mail-order sale—at a considerable profit—of books and recordings. A jury found that the evidence which was allowed to be presented to them at the trial, showed that the defendants were without belief in the statements which they had made to the persons from whom they obtained money. The United States Supreme Court, however, felt that the jury should not have been allowed to pass on this issue. Chief Justice Stone dissented vigorously, on the basis of the ample evidence available of the defendants’ hypocrisy, declaring¹⁰:

The state of one’s mind is a fact as capable of fraudulent misrepresentation as is one’s physical condition or the state of his bodily health.

The utility of such a doctrine for the practical resolution of many legal conflicts cannot be gainsaid; it does, however, have some special implications where the validity of religious belief is concerned.

⁷ *Cantwell v. Connecticut*, 310 U.S. 296 (1940); See Pfeffer, *Church, State, and Freedom*, 566 (1953).

⁸ *Scopes v. State*, 154 Tenn. 105; 289 S.W. 363 (1927).

⁹ 322 U.S. 78 (1944).

¹⁰ 322 U.S. at 90.

The classical definition of "religion" in American constitutional law ¹¹ declared that the term:

. . . has reference to one's view of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.

This definition is largely carried over into the present-day statutory definitions of "religion," but with some important additions. In provisions regarding exemption from military service, for example,¹² we find that:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views, or a merely personal moral code.

Now many persons have "merely personal moral codes" much more deserving of recognition than the doctrine of the "I am" movement, and most members of recognised faiths would concede that a significant part of their churches' activities is concerned with sociological matters. Again, the dividing line between ethical philosophy and theology is a fine one.

In the light of these various statutory and judicial pronouncements, it does not seem a cynical over-simplification to state the following as the pragmatic test of whether any one particular religious belief is to be included in the group to which legal protection will be afforded: (a) the test of time—whether it has survived for a sufficiently long time to become respectable, (b) whether its adherents are organised into a recognisable group with tenets whose existence may be empirically verifiable, and (c) whether those adherents are sufficiently numerous to force governmental consideration to be given to their beliefs.

4. THE MEANING OF "FREE EXERCISE THEREOF"

Some of the most notable justices on the Supreme Court bench have passed upon this subject, and have, over a considerable period of time, consistently declared that metes and bounds must be set to the liberty of speech, press, assembly and religion.

Despite the limitations on its extent, however, the basic freedom which *is* protected by the United States Constitution is very highly

¹¹ *Davis v. Beason*, 133 U.S. 333, 342 (1890).

¹² Universal Military Training and Service Act, 1948, 62 Stat. 613; 50 U.S.C.A. Appendix s. 456 (j) (1956).

protected. The freedoms specified in the First Amendment are strongly advocated to be placed in a "preferred" position. While religious freedom was not the first of these to receive such a nomination for preference, the term "preferred position" was apparently first used in a dissent in a case in which religious liberty was involved.¹³ While one would not quarrel with the elevation of these liberties to a "high constitutional position," nevertheless the statement—made by Justice Douglas when this case was reversed on re-argument¹⁴—that this elevation is of the nature of a "restoration" seems, at the least, questionable. However, although it may not yet be possible to say with certainty that the "preferred position" is here to stay, it cannot be denied that it is at least here.

The text of the Fourteenth Amendment, of course, nowhere contains the words "speech," "press," "religion," or "assembly," but by a process of judicial interpretation a situation has been reached, analogous to that of the concept of the "preferred position" of First Amendment freedoms, whereby those freedoms, originally protected against invasion only by the federal government, have been protected from State government action also, by "incorporation" of the First Amendment into the Fourteenth.

Similarly to the untrumpeted origins of the "preferred position" concept, "incorporation" had its beginnings in an "assumption" made by Justice Sanford in his opinion in *Gitlow v. New York*.¹⁵

Since that time, a continuing line of cases involving members of religious groups has protected their "liberty" from interference by State action. But although members of religious groups have been parties to each of these cases, the language of the court has at no time been specific as to whether, in the particular instance, the Fourteenth Amendment is transmitting, as against the States, freedom of speech,—or press,—or assembly,—or religion,—or some combination of any number of these four,—or some general concept of "liberty," undefinable in its nature, which is expressed at its most general in the words of the first section of the Fourteenth Amendment, and of which the four freedoms of the First Amendment are *pro indiviso* parts or facets.

Justice Frankfurter holds¹⁶ that Congress—and the States, if one accepts the theory of incorporation of the First Amendment into the Fourteenth—are restrained only from making laws which prohibit the free exercise of religious *belief* by laying down articles of faith to

¹³ *Jones v. Opelika*, 316 U.S. 584, 600 (1942).

¹⁴ *Jones v. Opelika*, 319 U.S. 103 (1943).

¹⁵ 268 U.S. 652, 666 (1925).

¹⁶ In, e.g., *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

which the community must subscribe. Justice Frankfurter has always, of course, been willing to find in State legislative determinations a greater degree of reasonableness than many other justices of the Supreme Court would attribute to them, and he usually makes such reasonableness a test of constitutionality.

But as to whether different *standards* are to be applied to federal and State invasion of First Amendment rights, the question is still in a state of flux. Justice Frankfurter's "reasonableness" test seems very much akin to, or, at the very least, readily to lend itself to, an application of differing standards. For, if one may have a standard of the "reasonable man" in the law of negligence, and that of a "reasonable trustee" in the law of trusts, may not one also have standards of a "reasonable state legislator" and a "reasonable federal legislator"? Much depends on the ability of the "preferred position" concept to withstand erosion. At the same time, an equal amount depends on the kinds of claims put forward in the name of religion, which conflict with regulatory measures of civil government; these fall next to be considered here.

5. THE MEANING OF "SECTARIAN PURPOSE"

Claims made by religious groups

Claim to have religious instruction in the schools. Parents are not obliged to send their children to public schools,¹⁷ but may instead send them to parochial schools.¹⁸ Nor may the establishment of parochial schools be prevented by such devices as the passing of a zoning ordinance prohibiting the construction of any but public schools in a certain area.¹⁹

Parents do, however, have to comply with reasonable requirements of the State directed towards the maintenance of standards of quality of instruction, and the State must be able to ensure that these standards are being met. Accordingly, if parents are to be privileged, for religious reasons, not to send their children to the public school, and to educate them themselves, at home, they must fulfil certification requirements laid down by the State, and give the children an equivalent number of hours of instruction to that which they would have received in the public school.²⁰ If the State is of the opinion that

¹⁷ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁸ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). "Parochial" is used here in the American technical sense of a school supported wholly by church funds, and not out of the public revenue.

¹⁹ *Roman Catholic Welfare Corporation v. City of Piedmont*, 45 Cal. 2d 325; 289 P. 2d 438 (1955).

²⁰ *Rice v. Commonwealth*, 188 Va. 244; 49 S.E. 2d 342 (1948).

even the meeting of certification requirements is an inadequate safeguard, it may forbid private education by a tutor altogether.²¹

Similarly, if the family belongs to a minority religious group so small in numbers as not to be able to operate a parochial school, the parents may not be allowed to keep their children at home to educate them under the guidance of their faith²²; and although the holy day of the parents' religion falls within the normal working week of the public school which their children otherwise regularly attend, the children may not be kept at home to observe that holy day.²³

The State can require that children in parochial schools receive secular education in specific branches of learning for a period equivalent to that adopted in the public schools,²⁴ but it may not prescribe regulations so minute as effectively to prevent operation of parochial or other religious schools altogether.²⁵

The teaching of sectarian doctrine in the public schools may be prohibited.²⁶ The State may certainly prohibit this where the doctrinal influence is of such dimensions as to amount to the operation of a parochial school system within the public school system, with the support of public funds, and teachers who have participated in carrying out such a policy may be barred in perpetuity from teaching in the public schools of that State.²⁷ Even short of such a state of affairs, a school board may not manipulate enrolments in a secular school so as to justify closing it down because of failure to meet the minimum enrolment for accreditation, and thereby oblige its pupils to attend a school giving sectarian instruction.²⁸

To the same end, a school board may refuse to allow free use of its buildings, outside of school hours, for sectarian meetings. The United States Supreme Court refuses to entertain this issue, as not posing a substantial federal question. The changing hands of money seems to be the controlling factor here, and not the obtaining of spatial facilities, since there does not appear to be any reported challenge to the *renting* of school buildings for a sectarian meeting.

Turning from the question of *what* shall be taught, to that of

²¹ *State v. Hoyt*, 84 N.H. 38; 146 Atl. 170 (1929).

²² *Commonwealth v. Renfrew*, 332 Mass. 492; 126 N.E. 2d 109 (1955).

²³ *Commonwealth v. Bey*, 166 Pa. Sup. 136; 70 A. 2d 693 (1950). This was a Moslem family.

²⁴ *People v. Donner*, 199 Misc. 643; 99 N.Y.S. 2d 830 (1950); *affd.* 302 N.Y. 857; 100 N.E. 2d 48; *dismissed for want of a substantial federal question*, 342 U.S. 884 (1951).

²⁵ *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Stainback v. Po*, 336 U.S. 368 (1949).

²⁶ *Miller v. Cooper*, 56 N.M. 355; 244 P. 2d 520 (1952).

²⁷ *Zellers v. Huff*, 55 N.M. 501; 236 P. 2d 949 (1951).

²⁸ *Wooley v. Spalding*, 293 S.W. 2d 563 (1956).

who shall teach it, we find a conflict of authority in the State courts on the question of whether secular instruction in the schools may be given by clerics. The question usually arises in the form of the permissibility or otherwise of the wearing of religious garb while teaching in the public schools. The United States Supreme Court has not yet passed upon the subject.

Seven States forbid the wearing of religious garb in the public schools. Nebraska and Oregon do so by statutes whose constitutionality has not yet been tested in their courts.²⁹ The Pennsylvania Supreme Court originally refused to enjoin this practice,³⁰ but six months after that decision had been handed down, the legislature of the State enacted a statute prohibiting it, and the constitutionality of the enactment was subsequently sustained.³¹ In New York, the State Superintendent of Schools made a regulation prohibiting the wearing of religious garb by teachers in the public schools, and forfeiting the right of further compensation to teachers who refused to comply. A teacher so affected brought suit for her salary accruing after the effective date of the regulation. The New York constitution provides that public property, credit, or money, shall not be used directly or indirectly in the aid of any school under the control of any religious denomination, and the regulation of the Superintendent was upheld as effectuating the declared policy of the State.³² The wearing of religious garb in the schools has similarly been struck down in other States.

On the other hand, the Supreme Court of Kentucky, for example, feels that this practice is an integral part of the religious beliefs of the teacher, and to prevent members of religious orders from teaching in the public schools would constitute a denial of equal protection of the laws, in contravention of the Fourteenth Amendment to the United States Constitution.³³

But whatever choice is ultimately made on a point of law, it will not resolve the dilemma with which parents find themselves confronted. Both the devout and the agnostic feel that their children should have some knowledge of religious teachings. The question is, where shall that knowledge be acquired, and in what form? The parent may feel himself inadequate to present the subject attractively and intelligibly. While conceding the need for disciplined study, he may still find institutionalised religion too oppressive in its formalism. The schoolroom, at first blush, appears an acceptable compromise.

²⁹ *Neb. Rev. Stats.* 79-1403, 1404 (1943); *Oreg. Comp. Laws Ann.*, ss. 111-2106, 111-2109 (1940).

³⁰ *Hysong v. Gallitzin Borough School District*, 164 Pa. 629; 30 Atl. 482 (1894).

³¹ *Commonwealth v. Herr*, 229 Pa. 132; 78 Atl. 68 (1910).

³² *O'Connor v. Hendrick*, 184 N.Y. 421; 77 N.E. 612 (1906).

³³ *Rawlings v. Butler*, 290 S.W. 2d 801 (1956).

At the moment of introduction of religion into the schools, however, the parent finds that although he may be uncertain as to what his child should know, he is very sure as to what he does not wish him to be taught. And so, one who surveys the field of legal conflict can make no more firm a pronouncement than that a little religious instruction in the public school, of a general, non-sectarian character, may, or may not, be a "Good Thing."

This instruction is usually thought of as being best, and most easily, provided, by reading the Bible. The conflict of cases over the constitutional permissibility of this usually stems from whether or not the Bible is thought of as being a sectarian book. Thus we have the conflict between Protestants and Roman Catholics as to the use of the King James or Douay versions of the Bible, and between Christians and Jews as to the use of the New Testament. Compounding this issue is the question of whether or not the Bible reading is accompanied by comment by the teacher, and/or other religious exercises such as hymn singing and repetition of the Lord's Prayer or other prayers.³⁴

The United States Supreme Court has not yet passed squarely on the matter, except to dismiss an appeal from the New Jersey Supreme Court which allowed this practice,³⁵ and to deny certiorari to the same court in a decision prohibiting the distribution of Bibles, free, to public school children, by a private organisation.³⁶

The preponderance of authority in the State courts is in favour of allowing the Bible to be read, and it is difficult to build up any guiding principle out of the cases in those States which disallow it. The tests commonly offered are those of whether or not the reading is accompanied by a commentary, and whether the material selected is such as to give a preference against one or more sectarian groups; if there is no commentary, and no preference, then the practice should stand. But these are unsatisfactory tests. In no other field of learning would we expect a child to draw the full meaning from what he reads without accompanying explanatory comment. But comment by the teacher will inevitably reveal his own personal preferences; and the exhibition of preferences is what we are seeking to eliminate. Even though the teacher remain silent, the Bible before the pupil's eyes gives mute testimony of preference against Protestants, Catholics or Jews—unless, perhaps, the distinction between Douay and King James versions and between Old and New Testaments is eliminated by having the pupil read from a set of selected passages

³⁴ See "Annotation: Bible Distribution or Reading in Public Schools," 45 A.L.R. 2d 742 (1956).

³⁵ *Doremus v. Board of Education*, 342 U.S. 429 (1952).

³⁶ *Gideons International v. Tudor*, 348 U.S. 816 (1954).

drawn up by the courts of his State. That such a solution is not too far-fetched is illustrated by the statement of the Supreme Court of Colorado,³⁷ that:

The ultimate answer to the question "sectarian or not?" whether with reference to the Bible or any other book or doctrine, must be by the courts . . .

Most parents wish to have their children receive "religious" instruction, and few would wish to forbid them access to such didactic material as may readily fall under the head of "religious." But as the opinions in various cases show, "religious" is all too easily confused with "sectarian," particularly in States where sectarian instruction is constitutionally forbidden, and many courts feel that Pontius Pilate's is the wiser and safer course of action.

A seeming solution to the dilemma is to have the religious instruction given by those best qualified—the minister, priest, or rabbi—each to his own, by dividing the pupils in the school into their respective religious groups, and having the religious officers come into the school to give them instruction there. This device—known as "released time"—was, however, struck down, as giving aid to religion.³⁸

But although public school pupils may not be released from their secular studies for sectarian instruction in another part of the school building, they may be released from school altogether, to receive such instruction outwith the school premises.³⁹ Strong dissents to this formula could find no difference between it and the formula struck down in the *McColum* case; assistance in the form of compulsion was given in each case, since the pupil who did not partake in the religious exercise had to remain within the school walls pursuing his secular studies. Justice Frankfurter added, however, in his dissent, that we should have an end to this problem, if the schools were to close their doors completely for an hour or two, leaving the pupils to go where they will, to God or Mammon. This device, known as "dismissed time," has been adopted by three States and sustained by their courts. The approving words of Justice Frankfurter suggest that the United States Supreme Court may well follow suit.

Claim for liberty to engage in missionary and proselytising activities. This may be engaged in with considerable vigour and vehemence and be quite offensive to persons holding differing views,⁴⁰

³⁷ *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 291; 255 Pac. 610, 617 (1927).

³⁸ *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1947).

³⁹ *Zorach v. Clauson*, 343 U.S. 306 (1952).

⁴⁰ *Cantwell v. Connecticut*, *supra*, n. 7.

although resort to epithets, or *personal* abuse, is not, in any proper sense, communication safeguarded by the Constitution.⁴¹

The distribution of doctrinal literature cannot be suppressed by requiring prior approval of its contents,⁴² nor by refusing a permit to distribute on the ground of the alleged bad character or possible fraudulent intent of the person distributing.⁴³ The right to distribute is not affected by the fact that the literature distributed incidentally solicits financial contributions.⁴⁴ Only the householder himself, and not the municipal authority, can indicate to itinerant evangelists that he does not wish to be disturbed in his private residence by the ringing of his doorbell.⁴⁵ It is clear that this is a right against invasion of private dwelling-houses only, and public or quasi-public buildings and streets are not protected.⁴⁶

But although individual evangelists may be regulated only in the manner above described, missionary activities which actively involve so many people as to constitute a parade or procession, may be regulated as to time, place, and manner, of holding.⁴⁷

Claim for liberty of public worship. A community has no right to deny use of its public parks for holding a meeting to a religious sect, merely because it dislikes the sect, or disagrees with its views.⁴⁸ This is so, even although the speaker addressing the meeting has previously attacked other religious groups and thereby caused some civil disorder.⁴⁹

In *Saia v. New York*⁵⁰ it was held that lecturers on religious subjects in a public park on a Sunday might not be forbidden to use sound amplification devices. The following year, however, the United States Supreme Court, in *Kovacs v. Cooper*,⁵¹ sustained a city ordinance which banned from that city's streets all loudspeakers and other devices which emit "loud and raucous noises." Although the majority opinion did not specifically do so, it was asserted by three of the four dissenters to it that the *Kovacs* decision amounted to a flat overruling of *Saia v. New York*.

Claim to immunity from public health measures. Freedom from compulsory vaccination cannot be claimed on religious

⁴¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁴² *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

⁴³ *Schneider v. Town of Irvington*, 308 U.S. 147 (1939).

⁴⁴ *Jamison v. Texas*, 318 U.S. 413 (1943).

⁴⁵ *Martin v. City of Struthers*, 319 U.S. 141 (1943).

⁴⁶ *Marsh v. Alabama*, 326 U.S. 501 (1946); *Tucker v. Texas*, 326 U.S. 517 (1946); *Watchtower Bible and Tract Society v. Metropolitan Life Insurance Co.*, 297 N.Y. 339; 79 N.E. 2d 433; *cert. den.* 335 U.S. 886 (1948).

⁴⁷ *Cox v. New Hampshire*, 312 U.S. 569 (1941).

⁴⁸ *Niemotko v. Maryland*, 340 U.S. 268 (1951).

⁴⁹ *Kunz v. New York*, 340 U.S. 290 (1951).

⁵⁰ 334 U.S. 558 (1948).

⁵¹ 336 U.S. 77 (1949).

grounds,⁵² nor exemption from X-ray examinations for tubercular infections.⁵³ Similarly, medical attention to a minor child cannot be denied by his parents on religious grounds.⁵⁴

The handling of poisonous snakes, so as to endanger the public health, safety and welfare, can be statutorily prohibited, even although the handling is an integral part of a religious service.⁵⁵

Claim to engage in practices which the majority opinion in society considers to be immoral. Plural marriages, although contracted in accordance with the tenets of one's church, nevertheless constitute the crime of bigamy,⁵⁶ and to take a female across State lines, in the process of contracting such a marriage, violates the Mann Act.⁵⁷ A person holding and practising these beliefs may be disenfranchised,⁵⁸ and a church which teaches those beliefs may have its charter voided and its property forfeited.⁵⁹

Claim to prevent society as a whole from engaging in practices which the religious minority considers against its interests. The laws relating to the practice of contraception again illustrate the difficulty of disentangling laws affecting "religion" from otherwise general measures which happen to be challenged at the instance of a religious group.

This topic is one which, largely through ignorance, has been classed with illegal obscenity. Because of the paucity of scientific knowledge and manufacturing mass production methods, there was relatively little that *could* be known about contraception, at the time when it was first referred to in any statutory enactment. This was the so-called Comstock law, a federal statute of 1873, prohibiting, *inter alia*, the mailing and importation of obscene literature, or articles for preventing conception.⁶⁰ The inclusion of contraceptive articles therein was almost by accident, and was not produced or notably influenced by the pressure of any religious group.⁶¹ Many

⁵² *Prince v. Massachusetts*, 321 U.S. 158 (1944), decided on the general principle of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), although the statute involved in the *Jacobson* case was not attacked under the First Amendment: *State v. Board of Education of Cincinnati*, 154 Ohio St. 469; 96 N.E. 2d 413 (1951).

⁵³ *State ex rel. Holcomb v. Armstrong*, 39 Wash. 2d 860; 239 P. 2d 545 (1952).

⁵⁴ *People v. Pierson*, 176 N.Y. 201; 68 N.E. 243 (1903); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618; 104 N.E. 2d 769; *cert. den.* 344 U.S. 824 (1952).

⁵⁵ *State v. Massey*, 229 N.C. 734; 51 S.E. 2d 179 (1949); *Harden v. State*, 188 Tenn. 17; 216 S.W. 2d 708 (1949); *Lawson v. Commonwealth*, 291 Ky. 437; 164 S.W. 2d 972 (1942); *Kirk v. Commonwealth*, 186 Va. 839; 44 S.E. 2d 409 (1947).

⁵⁶ *Reynolds v. United States*, 98 U.S. 145 (1879).

⁵⁷ *Cleveland v. United States*, 329 U.S. 14 (1946).

⁵⁸ *Davis v. Beason*, *supra*, n. 11.

⁵⁹ *Church of Latter Day Saints v. United States*, 136 U.S. 1 (1890).

⁶⁰ 17 Stat. 599. See, "Legis. Note: Some Legislative Aspects of the Birth Control Problem," 45 Harv.L.Rev. 723 (1932).

⁶¹ Blanshard: *American Freedom and Catholic Power*, 136 (1949).

States thereafter enacted "little Comstock laws." Over the years, contraceptive literature, materials and advice have gradually managed to rid themselves of the stigma of obscenity, until now there are only two States, Massachusetts and Connecticut, whose statutes are so worded as to restrict even physicians from giving what they believe to be adequate information on birth control.

The relevant provisions of the Massachusetts laws⁶² are to be found in Chapter 272, dealing with "Crimes against Chastity, Morality, Decency, and Good Order." The first dates from 1847:

Section 20. Penalty for Advertising, etc., . . . of Means to Procure Abortion.

Whosoever knowingly advertises, prints, publishes, distributes, or circulates, . . . any . . . printed paper . . . containing words or language giving . . . the name of any person . . . from whom . . . any . . . preparation . . . or any instrument . . . or any information . . . may be obtained for the purpose of causing . . . the miscarriage of a woman pregnant with child or of preventing . . . pregnancy, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two and one-half years or by a fine of not more than one thousand dollars.

—and the second from 1879:

Section 21. Other Offences against Decency.

Whosoever sells . . . any drug . . . or article whatever, for the prevention of conception . . . or advertises the same, . . . or manufactures . . . any such article, shall be punished by imprisonment in the state prison for not more than two and one-half years or by a fine of not less than one hundred nor more than one thousand dollars.

On the interpretation of these statutes, sections 20 and 21, together with the succeeding section 28, which deals with the publication and advertising of obscenity, when coupled together, effectively block all loopholes.⁶³ The constitutionality of all three sections was sustained in the Massachusetts Supreme Court.⁶⁴

In 1941, a Bill was introduced into the Massachusetts House of Representatives, proposing that these statutes should not apply:

. . . to treatment or prescriptions given to married persons for protection of life or health by or under the direction of registered

⁶² Mass. Ann. Laws, c. 272, ss. 20, 21 (1956).

⁶³ See Grant and Angoff: *Massachusetts and Censorship*, 10 B.U.L.Rev. 36, 155 (1930).

⁶⁴ *Commonwealth v. Allison*, 227 Mass. 57; 116 N.E. 265 (1917).

physicians nor to teaching in chartered medical schools nor to publication or sale of medical treatises or journals.⁶⁵

The Bill was introduced by way of an initiative petition under Article 48 of the Amendments to the Massachusetts Constitution. This Article also provides that:

No measure that relates to religion, religious practices or religious institutions . . . shall be proposed by initiative petition.

The Attorney-General of Massachusetts, as required by Article 48, certified that the proposed measure did not include such excluded matters. A public hearing on the Bill was then held by the House of Representatives' Committee on Public Health. At this hearing, the official representative of William, Cardinal O'Connell of Boston, testified that:

. . . when we realise that there are at least one million Catholics here in the Boston Diocese who are interested in it, that surely about one-half of the people in this Commonwealth are of the Catholic religion and they are interested in it, and everyone of them who have followed the teachings of their church believes that this is a matter that involves the safety of their immortal souls, then the question comes, "Is it not a religious question?" If it is a religious question, then, under the Constitution, it cannot go on the ballot.⁶⁶

This constitutional question was then referred to the Supreme Court of Massachusetts for an advisory opinion. They held ⁶⁷:

The proposed law is in the field of the police power for the promotion and preservation of the public health. . . . According to the common understanding, this, in general, is a secular field. And in our opinion the particular nature of the proposed law does not take it out of this field.

On its return to the legislature, the Bill was defeated in both Houses.

And thus the paradox. Despite the judgment of the Attorney-General and the Supreme Court of Massachusetts that this subject pertains to public health, both Protestants and Catholics alike are agreed that it pertains to religion. Whichever way one considers it, the fact remains that a large proportion, probably amounting to a majority, of the inhabitants of Massachusetts are, in theory, obliged to adhere to a doctrine of a faith which is not their own, under laws

⁶⁵ *Opinion of the Justices to the Senate and House of Representatives*, 309 Mass. 555, 556-557; 34 N.E. 2d 431 (1941).

⁶⁶ *Journal of the House of Representatives of Massachusetts*, 1021 (1941).

⁶⁷ *Opinion of the Justices, supra*, n. 65, 309 Mass. at 558.

which did not originate from a religious motive, and whose constitutionality now appears watertight.⁶⁸ A similar situation prevails in the State of Connecticut.⁶⁹

The field of contraception may have to be considered as a special case. In other directions, religious interests have met with less success in imposing their views on non-adherents. It has been firmly held that a State censor cannot be granted unlimited power, with no guide except the pressure of powerful orthodoxies, as to what constitutes a "sacrilegious" motion picture,⁷⁰ and school textbooks cannot be suppressed merely because characters described as belonging to a particular religion are portrayed in a derogatory or offensive manner.⁷¹

Claim to be exempt from military service. This is granted⁷² as a privilege by Congress. The United States does possess the constitutional power to compel military service from those whose religious convictions preclude participation, but does not exercise it. This power is frequently exerted by the States. Thus, college students who refuse to enrol in a required course in military training may be expelled.⁷³ A State may refuse to admit to the bar an otherwise duly qualified applicant who is a conscientious objector; the States are not compelled to follow suit with Congress.⁷⁴

Claim to perform business transactions on a holy day observed only by other religious faiths. Justice Field laid down the classical theory for the interpretation of Sunday laws in the States in 1885⁷⁵:

Laws setting aside Sunday as a day of rest, are upheld not from any right of government to legislate for the promotion of religious observance, but from its right to protect all persons from the physical and moral debasement, which comes from uninterrupted labour.

However, a New York case of 1950,⁷⁶ in which a shopkeeper of the Jewish faith was prosecuted and convicted for selling meat on

⁶⁸ Unless, perhaps, some adaptation might be made of the doctrine of the *Child Labor* cases—*Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

⁶⁹ See *State v. Nelson*, 126 Conn. 412; 11 A. 2d 856 (1940).

⁷⁰ *Burstyn v. Wilson*, 343 U.S. 495 (1952).

⁷¹ *Rosenberg v. Board of Education*, 196 Misc. 542; 92 N.Y.S. 2d 344 (1949). The book involved was Dickens' *Oliver Twist*.

⁷² Universal Military Training and Service Act, *supra*, n. 12.

⁷³ *Hamilton v. Regents*, 293 U.S. 245 (1934).

⁷⁴ *Re Summers*, 325 U.S. 561 (1945). But see *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957); *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), holding that past membership in the Communist Party is not in itself a bar to the practice of law, and thus not to admission to the bar.

⁷⁵ *Soon Hing v. Crowley*, 113 U.S. 703 (1885).

⁷⁶ *People v. Friedman*, 302 N.Y. 75; 96 N.E. 2d 184 (1950); appeal dismissed for want of a substantial federal question, 341 U.S. 907 (1951).

a Sunday, although he observed the day of rest particular to his religion, has been described ⁷⁷ as:

. . . another of the many examples of the use by courts of fictions (in this case that Sunday laws are health rather than religious measures) to avoid deciding against a dominant religion.

Claim to have governmental recognition of church heads. The official relations of the United States with the Vatican have had a somewhat chequered career. Controversy, in its legal aspects, centres round the question of whether the First Amendment restricts *presidential* action—in appointing ambassadors, or even “personal representatives”—since the wording of the Amendment refers only to Congress. The counter argument to this ⁷⁸ points out that any Act of Congress appropriating funds for any embassy would be a “law” at which the First Amendment, if held applicable, would strike. The argument hinges on whether the Pope is held, under the Lateran Treaty of 1929, to be a temporal ruler over the one hundred or so acres of the Vatican territory, or to be the head of an international church. The whole question remains unsolved.

Assistance given by the federal or State governments which benefits religious groups

In the field of education. Free bus transportation to and from school, may, constitutionally, be extended to pupils attending parochial schools.⁷⁹ Prior to the case in which the United States Supreme Court so held, the question had been litigated in the courts of eleven States, the outcome depending on the provisions of the respective State constitutions. Although free transportation was originally struck down in New York,⁸⁰ this decision was immediately overcome by a constitutional amendment authorising the legislature of the State to “provide for the transportation of children to and from any school or institution of learning.”⁸¹ In four States free bus transportation has been struck down on *non-constitutional* grounds.

There has been much less litigation regarding the providing of free textbooks to children attending parochial schools. This practice has been struck down in four States. In the only case on the subject to reach the United States Supreme Court, the practice was upheld.⁸²

⁷⁷ Pfeffer, *op. cit.*, *supra*, n. 7 at 241.

⁷⁸ Pfeffer, *op. cit.*, *supra*, n. 7 at 257, 270–271

⁷⁹ *Everson v. Board of Education*, *supra*, n. 2.

⁸⁰ *Judd v. Board of Education*, 278 N.Y. 200; 15 N.E. 2d 576 (1938).

⁸¹ New York Constitution, Art. XI, s. 4.

⁸² *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930).

This decision may, however, be thought to be overruled *sub silentio* by Justice Black's opinion in the *Everson* case.⁸³

The National School Lunch Act⁸⁴ authorises the grant of federal funds to provide lunches and lunch-room equipment for the benefit of students in both public and non-profit schools. Under the Serviceman's Readjustment Act of 1944,⁸⁵ the Federal Government paid tuition costs in schools and colleges which, by the choice of the ex-serviceman, might be sectarian. In the State of New York, the State Emergency Joint Housing Board allocated over one hundred thousand dollars, from an appropriation made for emergency housing, to a religious educational institution, which became, in effect, a gift to that institution, the architects' plans disclosing that the State would not be able to remove any additions made to the institution's buildings. A suit to enjoin this allocation, as being for a sectarian purpose, and thus in contravention of the State constitution, was dismissed on the ground of lack of standing to sue, the State of New York providing no "taxpayer's suit" under these particular circumstances.⁸⁶

Tax exemptions granted to religious groups and persons. The law reports disclose little litigation on the question of the constitutionality of granting exemption from taxation to religious groups and individual members thereof, and this paper is not the place for a detailed examination of principles of the law of taxation. The leading, and almost the only, case, on the subject,⁸⁷ holds that the non-discriminatory tax exemption of religious institutions does not constitute an establishment of religion. All States now permit such exemptions.

It has been held, in a lower federal court,⁸⁸ that the application of the federal Fair Labour Standards Act of 1938, to employees of a religious corporation who worked at that part of the corporation's activities which constituted inter-state commerce, did not unconstitutionally impose a flat tax on religion or prohibit the exercise of religion.⁸⁹

⁸³ See Sutherland, "Due Process and Disestablishment," 62 Harv.L.Rev. 1306, 1316-1317 (1949).

⁸⁴ 60 Stat. 230; 42 U.S.C., s. 1751.

⁸⁵ 58 Stat. 287; 38 U.S.C., s. 701.

⁸⁶ *Bull v. Stichman*, 189 Misc. 590; 72 N.Y.S. 2d 202 (1947); *affd.* 298 N.Y. 516; 80 N.E. 2d 661 (1948).

⁸⁷ *Garrett Biblical Institute v. Elmhurst State Bank*, 331 Ill. 308; 163 N.E. 1 (1928).

⁸⁸ *Mitchell v. Pilgrim Holiness Church Corporation*, 210 F. 2d (7th Cir., 1954).

⁸⁹ On occupational licence taxes as applied to members of religious organisations, see *Jones v. Opelika*, *supra*, nn. 13 and 14; *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

CONCLUSIONS

It appears, then, that Chief Justice Waite's declaration in 1879⁹⁰ that:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practice—

still holds true, that is to say, that there is a valid distinction to be made between freedom to *believe* and freedom to *act*.

"Actings" have to be defined a little more closely, however, and it is in this area that our other distinction—between freedom *from* and freedom *to*—is relevant. Members of religious organisations are free *to* propagate their principles, in the sense that they are free from restrictions or limitations on this right. They are not, of course, free from any limitations whatsoever, but at the least, any restrictions which are attempted to be placed on them will be very carefully scrutinised, as will the way in which the power to restrict may be exercised. At best, more protection may be given to the right to religious liberty than to many other constitutional rights, that is to say, freedom of religion may be one of those rights which are in a "preferred position."

But what is most important to note here is that this protection is afforded equally to the freedom of speech, press, and assembly, as to freedom of religion, and that it is, in fact, afforded primarily to those rights, and not to the purposes for which they are exercised. The policy of the civil government is to allow freedom of *expression*, and this is the policy which the words of the First Amendment express. The personal characteristics of the person who raises a lawsuit to claim the continuance of this declared policy are largely irrelevant. "Religion" provides only the context or framework in which the right is exerted, and it is specifically mentioned in the Constitution rather as an important and frequently occurring market place of ideas, than as an area of freedom peculiarly *sui generis*.

We may, and should, therefore, withdraw oral and written expression from the heading of "actings" when we speak of freedom to act, in the context of religion. To these will apply only Justice Holmes' "clear and present danger" test,⁹¹ and not the "ill tendency" test against which Jefferson warned.⁹²

If we then turn, after making this exclusion, to the aspect of "freedom *to*," we find a very different picture. Members of religious

⁹⁰ *Reynolds v. United States*, *supra*, n. 56; 98 U.S. at 166.

⁹¹ *Schenck v. United States*, 249 U.S. 47 (1919).

⁹² Preamble to Virginia Bill for Establishing Religious Freedom, quoted in *Reynolds v. United States*, *supra*, n. 56; 98 U.S. at 163.

groups are *not* free to act, where the purposes of those actings are at variance with the purposes of the civil government.

Nor can we find an apologetic in the "establishment" clause of the First Amendment. At the State level, even a formal and technical establishment of one particular church might not be impossible, as we have seen. At the federal level, omitting trivial acts of "recognition" of religion, we find the Federal Government supplying considerable financial "assistance."

There are two other areas to be noted: Massachusetts has its laws on contraception: and all governments, both State and federal, have exemptions from their tax laws, in favour of religion and its purposes. It may be argued that the validity of these laws lies in their being non-discriminatory. This test is appealing in form, but unhappy in some of its implications.

In particular, one is well aware that the Massachusetts laws are as much honoured in the breach as in the observance. The reader is commended here, not to published authority, of which there is none, but to his own empirical research. The law is not put to the test of rigid enforcement. This may be satisfactory as a working arrangement, but less so as a ground of constitutionality.

There is, also, an unpleasant analogue of non-discrimination—that of uniformity. In matters affecting beliefs, it is not a far step to take, from demanding that none be treated differently, to demanding that all behave alike. Justice Frankfurter, sincerely believing, amid the stresses of the year 1940, that "national unity is the basis of national security," could not allow small children, who had been taught by their parents to think along different lines, to be excused from saluting the country's flag.⁹³ In Hawaii, bilingualism was considered undesirable in promoting "cultural unity," and therefore extensive restrictions were placed on instructing school children in a second language.⁹⁴

Now once public policy has become a matter of declared law, to alter it by judicial means is a difficult operation and one not to be undertaken lightly. The courts are, however, interpreters of public policy, when they pass upon that expression of it which is contained in the law of the Constitution. Paradoxically, the conclusion seems inescapable, that if they are to maintain the constitutional policy of "liberty" or "freedom," the courts must adopt the same principle to prevent the elevation of dogma to the status of "public policy," as is used by the dogmatist to prevent deviations from articles of faith, once these are enforceably established—the principle advanced

⁹³ *Minersville School District v. Gobitis*, 310 U.S. 586, 595 (1940).

⁹⁴ See *Farrington v. Tokushige*, and *Stainback v. Po*, *supra*, n. 25.

here, that persons whose general "purposes" are not the same as those of the lawfully constituted government cannot be allowed freedom to act. The differentiating feature between the two applications of this principle is the exclusion of the right of free expression of ideas from our definition of "to act." Only by such free expression can we arrive at the most accurate definition of what are the purposes of government, and of what are the purposes which cannot be allowed to stand in opposition. Oral and written expression are therefore to be left untrammelled.

And so, at rock bottom, we find that our concept of religious liberty, as a practical matter, seems to amount to this: (i) we will not allow payment of money "directly" to any religious institution, and particularly, not to any school which teaches religious dogma as an integral and compulsory part of its curriculum, and (ii) we will not compel anyone to say that he believes that which he does not personally think to be true.

If it is felt that there can be no true freedom of religion without freedom to act, in the fullest sense, and not in the restricted sense used here, then the only solution appears to be constitutional amendment. We have seen a precedent for this in the State of New York, over the matter of free bus transportation for school children. Even short of this, to have the clauses referring to religion taken out of the First Amendment and re-enacted separately and more definitively—so as to distinguish more clearly, for example, between the "establishment" and "free exercise" clauses—would be helpful from the point of clarifying grounds of judicial decision. One would, however, regret the loss of flexibility of decision at present available through utilisation of the clauses conferring freedom of speech, press, and assembly. Of course, if the "establishment" aspect of the problem could be satisfactorily dealt with by a separate amendment touching on that alone, then the "free exercise" aspect might easily be omitted from the First Amendment, and brought under the "expanded" concept of "liberty" in the due process clauses of the Fifth and Fourteenth Amendments.

As far, then, as our *limited* definition of freedom of religion in the United States is concerned, the problem areas for the future would appear to be the following:

(1) In the area of financial assistance to religion, the problem will be to define what is "direct" assistance. The resolution of the issue of free bus transportation, for example, amounts to saying that this kind of financial aid is given, not to religion "within the meaning of the First Amendment," but to children, or to their parents, in furtherance of the education policies of the State; religion simply has no relevance to bus transportation. On such a

classification of the issue—and that appears to be the only possible rationalisation of the *Everson* decision—the test of discrimination may then competently be used in the allocation of funds, in the same sense that it is applied in the setting of different rates of income tax for persons of differing means; the relevant factor then becomes means, and not religion.

(2) In the area of establishing compulsory beliefs, the problem will be to decide at what point an individual is being “compelled” to believe. An illustrative issue here is the, as yet, unresolved problem of “released” time and “dismissed” time, in the field of religious studies in the public schools. The issue of compulsion is, of course, separate from that of whether any establishment of religion exists here. A subsidiary problem, in this connection, is to obtain a more open and general consensus that “establishment” is a technical and limited term.

(3) Intertwined in both these problem areas is the question of when, and how, we are going to allow them to be raised in the courts—the problem of “standing to sue.”

The Federal Government is little involved in litigation over religious liberty, since it evades being drawn into the arena of conflict by refusing the right of a taxpayer to enjoin the execution of a federal appropriation statute.⁹⁵

Several States do allow “taxpayers’ suits,” but on varying conditions. The litigant may or may not be required to possess some directly personal and measurable pecuniary interest, to give him standing to sue.⁹⁶

(4) Lastly, compounding the problem of standing to sue, is the need, as a condition precedent to litigation, to find a manifestation of official “state action,” in some form or another.

In the final analysis, religious liberty in the United States seems principally to be a question of “states’ rights,” the individual citizen having little to fear from the Federal Government, and much to gain as a beneficiary of national legislation. The greater proportion of the adjustment of the individual’s rights with the purposes of civil administration appears a matter for State courts and State legislatures. The ultimate placing of faith must be in a “prevailing liberality” or spirit of “toleration” throughout the social structure. As was observed at the outset of this discussion, it does not appear that a formal guarantee of “freedom,” and individual assertions thereof, have necessarily been conducive to toleration.

⁹⁵ *Frothingham v. Mellon*, 262 U.S. 447 (1923).

⁹⁶ Cf. *Doremus v. Board of Education*, 5 N.J. 435; 75 A. 2d 880 (1950); *appeal dismissed*, 342 U.S. 429 (1952); *Bull v. Stichman*, *supra*, n. 86; *Illinois ex rel. McCollum v. Board of Education*, *supra*, n. 38.

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This digest, which has been compiled by the Editor and G. J. Borrie, Barrister-at-Law, covers the period July 1, 1959, to September 30, 1959.

UNITED KINGDOM

COURTS

Appeals

On July 30, 1959, the Home Secretary stated that the Government intended to propose that the law should be amended so as to provide for an appeal from the Divisional Court to the House of Lords in any criminal cause or matter, including not only applications for habeas corpus but also applications for the prerogative orders and cases stated by magistrates or quarter sessions, as well as convictions for criminal contempt of court. It was proposed that an appeal should lie only where the point of law involved was one of general public importance which merited consideration by the highest tribunal. The Government proposed at the same time to abolish the certificate procedure under section 1 (6) of the Criminal Appeal Act, 1907, and to provide for appeals from the Court of Criminal Appeal to be dealt with on substantially the same basis as those from the Divisional Court (610 H.C. Deb. 669-670).

Statistics

The civil judicial statistics relating to the Judicial Committee of the Privy Council, the House of Lords, the Supreme Court of Judicature, county courts and other civil courts, for 1958, have been published (Cmnd. 802).

CRIMINAL LAW

Statistics

The statistics relating to crime and criminal proceedings, in England and Wales, for 1958, have been published (Cmnd. 803).

See also COURTS (above).

EDUCATION

Statute

The Education Act, 1959 (7 & 8 Eliz. 2, c. 60), received the Royal Assent on July 29, 1959. It enables the Minister to make larger grants to aided schools and special agreement schools.

Where under section 102 (which relates to maintenance contributions for alterations and external repairs), section 103 (which relates to grants to schools transferred to new sites or established in substitution for former schools) or section 104 (which relates to schools established for the accommodation of displaced pupils) of the Education Act, 1944, the Minister may make a contribution or grant, the maximum contribution or grant is raised to 75 per cent. of the total expenditure, section 1 (1). Section 1 (2) (3) authorises a new grant of 75 per cent. towards the cost of building new

schools needed to provide secondary education for pupils from primary aided and special agreement schools. Section 1 (4) authorises loans under section 105 of the 1944 Act to cover the remainder of the cost. The increased grants and contributions are only available in respect of expenditure on work begun after June 15, 1959.

The Act does not apply to Scotland or to Northern Ireland.

GOVERNMENT FUNCTIONS AND APPOINTMENTS

Control of expenditure

The observations of the Lords Commissioners of the Treasury on the report made last year by the Select Committee on Estimates were published as a White Paper in June, 1959.

In these observations, the Government rejected the Select Committee's proposal that a small independent committee, which would have access to Cabinet papers, should be appointed to report upon the theory and practice of Treasury control of expenditure. It decided, however, to set in hand an internal review under the general authority of the Chancellor of the Exchequer. On some aspects of this review, the Government proposed "to seek advice from persons with appropriate knowledge and experience who are not members of the Government service. The progress of this review, and of Ministers' consideration of the various propositions which may be formulated as a result, will necessarily be confidential. But the conclusions reached by the Government will be reported to Parliament in due course."

The White Paper explained that a review of the scope proposed in the Select Committee's report would involve, in effect, a review of the Chancellor's conception of his own responsibilities. Secondly, it would also, in practice, require a thorough examination of the financial control exercised by each major department. Most significant of all, the majority of important matters of policy have economic or financial implications, which have to be considered by Ministers collectively. It is, therefore, impossible to appraise realistically the efficiency of the Government's financial control without considering the working of the central processes of government.

On the recommendation relating to access to Cabinet papers, the Government observed: "My Lords cannot, however, believe that it would be thought appropriate that a committee of independent persons should be invited in this way to scrutinise and pronounce on the inner counsels of Government, or on the resulting decisions, for which the Government are collectively responsible to Parliament and to Parliament alone."

The Select Committee had recommended a dynamic approach to expenditure in the civil sector, using the "forward look" concept in preparing estimates. The Government observed: "My Lords are entirely at one with the committee's views about the value obtainable from this technique. But, in fact, forecasts of all civil expenditure, up to three years ahead, have been prepared annually for many years past. They play a very important part in the general control of Government expenditure, and are regularly reported to the Cabinet by the Chancellor of the Exchequer." In an appendix to the White Paper, it was pointed out that "forecasts of civil expenditure are submitted to the Treasury by all departments in January of every year, covering projected expenditure up to March of the next year but two (*i.e.*, for rather more than three years ahead), and they are revised during the summer (usually May or June). Certain important sections of Government expenditure are also reviewed on the basis of long-term forecasts during the course of the Government's annual review of future investment expenditure in the public sector."

The Government also expressed firm disagreement with the criticism that the Treasury had not wholeheartedly accepted the theory of departmental

responsibility and partnership in control of expenditure. On the suggestion that "while new expenditure may be carefully watched, 'continuing' expenditure may escape relatively unchallenged," the White Paper explained that "the main responsibility for maintaining a vigilant care for economy in 'continuing' expenditure rests, and must rest, with the spending departments; and it is neither necessary nor right for the Treasury to maintain a constant and meticulous supervision over everything which departments do in the discharge of their responsibilities." But it does not follow that "'continuing' expenditure may escape relatively unchallenged" either by the departments or by the Treasury. For the Treasury do, in fact, supplement the department's own efforts by maintaining a constant watch on "'continuing' expenditure as well as by taking action themselves to bring particular areas of such expenditure under special review from time to time in consultation with the departments concerned."

The Government accepted the need for the system of Treasury control to be kept under review. "My Lords entirely agree," the White Paper observed, "that the operation of Treasury control, both in general and in particular, must be constantly reviewed and brought up to date, and that has been the endeavour of all Governments within recent times. As a result, the operation of Treasury control has been largely transformed during the last forty years, mainly on the initiative of the Treasury itself. The overriding principle adopted by successive Governments has been that financial control is a matter of partnership between the Treasury and the spending departments, each party being bound to assume to the full the responsibility which is proper to it" (H.C. 227 of 1958-59).

On July 30, 1959, the Chancellor of the Exchequer spoke of the Government's proposed review of the control of public expenditure. He said that he was appointing a small group, under the general charge of Lord Plowden, to carry out a full examination. The group would include two or three persons from outside the Government service and other members would be senior officials drawn from departments including the Treasury (610 H.C. Deb. 149-150).

Inspectorate

Constabulary. The report has been published of H.M. inspector of constabulary for Scotland for 1958 (Cmnd. 770).

Factories. The annual reports of the chief inspector of factories for 1958 (Cmnd. 810) and of the chief inspector of factories on industrial health for 1958 (Cmnd. 811) have been published.

Ministers' functions

Pensions and National Insurance. The report for 1958 has been published (Cmnd. 826).

Prices, Productivity and Incomes

Report. The third report of the Council (Chairman: Lord Cohen) has been published (H.M.S.O. 70-776-3; for terms of reference see [1958] P.L. 165).

HIGHWAYS

London

Report of the Committee on London Roads (Chairman: G. R. H. Nugent, M.P.) has been published.

Standing committees. On July 29, 1959, the Minister of Transport and Civil Aviation gave details of functions and membership of London and Home Counties Traffic Advisory Committee, the London Travel Committee,

and the Traffic Users Consultative Committee for the London Area (610 H.C. Deb. 66-67).

INQUIRIES

Transport

Air. The report has been published of the public inquiry into the causes and circumstances of an accident on September 2, 1958, to Viking Aircraft G-AIJE. The report is dated May 27, 1959 (C.A.P. 155).

The Minister of Transport and Civil Aviation has stated the terms of reference of the committee to inquire into the regulations and practice governing investigations of accidents and concerning the licences of pilots and others. Sir David Scott-Cairns, Q.C., has been appointed Chairman. The Minister has also published a clarification of the rights of blame-worthy persons, etc., under the Civil Aviation (Investigation of Accidents) Regulations, 1951 (610 H.C. Deb. 67-71, July 29, 1959).

The Air Navigation (Investigation of Combined Military and Civil Air Accidents) Regulations, 1959, made by the Secretary of State and the Minister of Transport and Civil Aviation acting jointly under section 10 of the Civil Aviation Act, 1949, and the Civil Aviation Act (Application to Crown Aircraft) Order, 1959, provide for the holding of investigations and public inquiries into accidents occurring to military aircraft (including accidents to foreign military aircraft occurring in the United Kingdom) in circumstances in which there is a civil aviation element, *e.g.*, where a military aircraft collides with a civil aircraft or crashes on a civil aerodrome, and also make provision for the holding of investigations and public inquiries under the Regulations into accidents occurring to a civil aircraft in circumstances in which there is a military element. The Regulations provide that in the case of such accidents the Minister of Transport and Civil Aviation acting jointly with either the Admiralty, a Secretary of State, the Minister of Supply, or one or more of them, as the case may be, may direct that the accident shall be treated as one to which the Regulations apply.

The procedures governing investigations and public inquiries into accidents to which the Regulations apply follow those laid down by the Civil Aviation (Investigation of Accidents) Regulations, 1951, which relate to civil aviation only, subject to certain modifications following from the fact that two or more Ministers are concerned and that military aircraft are involved (S.I. 1959 No. 1388).

Railway. The report has been published on the accident on December 11, 1958, between Urmston and Trafford Park near Manchester (dated May 25, 1959).

LOCAL GOVERNMENT

Finance

Borrowing. The Public Works Loan Commissioners (Officers' Powers) Regulations, 1959, provide for the Assistant Secretary to the Public Works Loan Commissioners, or such other officer as may be approved by them, to perform any of the functions authorised by Regulation to be performed by their Secretary (S.I. 1959 No. 1253).

The Treasury has published the 84th annual report of the Public Works Loan Board, for 1958-59 (H.M.S.O. 63-36-0-59).

Rating and Valuation. The Report of the Committee on the Rating of Charities and Kindred Bodies has been published. In summary the Report states that the aggregate rateable value of the hereditaments relieved under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, is little more than 1 per cent. of the aggregate for all hereditaments in England and Wales. Section 8 appears to have worked reasonably well but has given rise to a disproportionate volume of litigation and as a permanent

solution would be indefensible. Assistance to charities and kindred bodies should be by way of rate relief and should take the form of rate reduction or remission and not of derating. Charities should have mandatory relief, and a single rate of relief accorded to national and local charities. Relief of 50 per cent. is recommended. Discretion to reduce or remit rates should extend over a wider field than that of section 8.

The Scientific Societies Act, 1843, should be repealed, but transitional arrangements should be effected to make the effect gradual (Cmnd. 831).

Premises occupied by ratepayers were used for the sorting and grading of skins, and their subsequent sale by auction to furriers. About 25 per cent. of the skins belonged to a company, the remainder being consigned by a number of different owners in the form of bales comprising a number of different species and qualities. Before sale the skins were sorted and graded into auction lots suitable for sale, each comprising a number of skins of the same species and quality, a process requiring great skill and experience. Each lot would contain skins which had been consigned by a number of different owners, and were identified throughout, the price bid being so much per skin, and the proceeds being credited to the respective owners. The ratepayers claimed that this operation constituted an "adapting for sale" of the skins, so that their premises constituted a "workshop" within the meaning of section 149 of the Factory and Workshop Act, 1901, with the consequence that they qualified as an "industrial hereditament" within the meaning of section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. The Lands Tribunal held that the premises did not qualify as an industrial hereditament. The Court of Appeal affirmed this decision. *Held*, that the grading and sorting of the skins was an "adapting for sale" within section 149 of the Act of 1901, but as there had been no finding by the Lands Tribunal whether any manual labour was exercised in such adapting for sale the case should be remitted for determination of that question: *HUDSON'S BAY CO. v. THOMPSON* [1959] 3 W.L.R. 317; [1959] 3 All E.R. 150, H.L.

In 1955 a company had obtained the right to fix and exhibit a "flashing neon advertising sign" on certain premises, the sign and the apparatus to remain the property of the company. In 1956 it was conceded that the "right" which the company had obtained was a "separate hereditament" for the purposes of the Local Government Act, 1948, and the rateable value was £165. The company conceded that the advertising sign constituted a structure but contended that the rateable value should be £150 and that it should be determined under section 56 of the Act of 1948 and section 22 (1) (b) of the Rating and Valuation Act, 1925, on the basis that it was a right to exhibit advertisements on a structure to be erected, and not that of a right to exhibit on a structure when erected. The Lands Tribunal reduced the assessment to £150: the rating officer appealed. *Held*, that the right to use the structure which the company had erected for advertisements was a separate hereditament under section 56 of the Act of 1948 and that they were therefore liable for the higher rating figure of £165. *Per Sellers L.J.*: "The purpose of [section 56 of the Local Government Act, 1948] is to place the liability to rates in respect of the exhibition of advertisements on land, as defined, directly on the person enjoying the right to advertise instead of upon the occupier of the land": *IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND) v. PIERSON* [1959] 1 W.L.R. 761.

Under the Lands Tribunal Rules, 1956, r. 45 (4), the tribunal is entitled on an appeal to it to accept the decision of the valuation court unless it is satisfied, by the ratepayer, that there is something wrong as a matter of fact with the court's finding. The applicant had appealed to the Lands Tribunal against his rating assessment by the local valuation court. The assessment was upheld. He now appealed on the ground that it was for

the Lands Tribunal to make its own assessment, whereas they had held that it was for him to prove that the local valuation court's assessment was wrong. The plaintiff also sought to rely on the purchase price of the house as evidence of its rateable value. *Held*, (i) that the Lands Tribunal had been guilty of no misdirection or error of law; (ii) that the selling or purchase price of a property is not a relevant factor when assessing the value under the Valuation for Rating Act, 1953, s. 2 (2): *SOLE v. HENNING* [1959] 1 W.L.R. 769.

For an organisation to be entitled to rating relief under section 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, it must satisfy both the following tests: (1) Is this an organisation which is not established or conducted for profit? (2) Is it one whose main objects are charitable or otherwise concerned with the advancement of education? If it can answer both these questions in the affirmative then it is entitled to exemption. The main objects of a society which was a company limited by guarantee, as stated in clause 3 of its memorandum of association, were: "(a) To acquire and take over as a going concern and conduct as a scientific and educational undertaking the business heretofore carried on as the Chester Zoological Gardens . . . by the Chester Zoological Gardens, Ltd., together with any part of the real or personal property and assets of the company used in connection with that business . . . (b) To promote, facilitate and encourage the study of biology, zoology and animal physiology, aviculture, aquaria, ichthyology, entomology, botany and horticulture and all kindred sciences and to foster and develop among the people an interest in and knowledge of animal life. (c) To establish, equip and carry on and develop zoological parks or gardens and living zoological collections at such places as the society shall determine . . ." Clause 4 provided that the income and property of the society should be applied solely towards the promotion of the society's objects and no part should be paid by way of profit to members. The society claimed to be entitled to the benefit of the provisions of section 8 (1) (a) of the 1955 Act and the Divisional Court held that they came within that section. The rating authority appealed. *Held*, (1) that the main objects of the society were to be found in paragraphs (a), (b) and (c) of the memorandum and that the society was conducted, by and large, as an educational, or as a scientific and educational, undertaking; (2) that the society was not established or conducted for profit, but was an educational charity. The appeal was dismissed: *Re NORTH OF ENGLAND ZOOLOGICAL SOCIETY, NORTH OF ENGLAND ZOOLOGICAL SOCIETY v. CHESTER RURAL DISTRICT COUNCIL* [1959] 1 W.L.R. 773; [1959] 3 All E.R. 116, C.A.

Surcharge. An appeal to the High Court does not lie in respect of a surcharge made by the district auditor on the directions of the Minister under section 229 (2) of the Local Government Act, 1933; but the person surcharged may apply to the High Court under section 230 for relief.

The clerk to a local authority and the chief public health inspector appealed to the High Court against surcharges imposed on them by the district auditor on the directions of the Minister under section 229 of the Act of 1933, following an appeal by a person aggrieved by the decision of the auditor not to impose a surcharge. *Held*, that an appeal to the High Court only lay from a decision of the auditor in his judicial capacity under section 226 or 228; it did not lie from the performance by him of an administrative duty in obeying the direction of the Minister; the High Court could, however, grant relief under section 230; *DEAN v. DISTRICT AUDITOR FOR ASHTON-IN-MAKERFIELD* [1959] 2 All E.R. 577, D.C.

Fire Services

The Fire Services Act, 1959 (7 & 8 Eliz. 2, c. 44), received the Royal Assent on July 9, 1959. It abolishes certain powers of the Secretary of

State with regard to fire services. Section 1 removes certain restrictions imposed on the exercise of the functions of fire authorities by the Fire Services Act, 1947; section 2 amends section 2 of the 1947 Act in relation to the making of reinforcement schemes; section 3 amends section 7 of the 1947 Act with regard to joint committees; section 4 amends section 12 of the 1947 Act in relation to arrangements for the discharge of the functions of a fire authority by another authority; section 5 amends section 17 of the 1947 Act in relation to conditions of service; section 6 amends section 18 of the 1947 Act in relation to establishment schemes; section 8 and 9 relate to the pensions of persons transferring to or from the fire service; section 10 provides for the employment of a member of a fire brigade as a temporary instructor; section 11 amends section 36 of the 1947 Act in relation to public inquiries in Scotland; section 12, financial provisions.

The Fire Services Act, 1959 (Commencement No. 1) Order, 1959, provided that subsections (1), (2) and (3) of section 8 of the Fire Services Act, 1959, should come into operation on August 15, 1959 (S.I. 1959 No. 1401).

The Fire Services Act, 1959 (Commencement No. 2) Order, 1959, provided that all other provisions of the Fire Services Act, 1959, should come into operation on September 14, 1959, except paragraphs (c) and (d) of section 1, section 7 and the entries in the Schedule relating to sections 19 and 20 of the First and Second Schedules to the Fire Services Act, 1947 (S.I. 1959 No. 1452).

London

The Minutes of Evidence of the Royal Commission on Local Government in Greater London have been published for Days 11–24 (H.M.S.O. 73–35–12, 15, 17, 18, 19, 20, 21, 22, 23, 24).

Meetings

Admission of the Press. The text has been published of the letter sent by the Ministry of Housing and Local Government to the Town Clerk of Nottingham after the Press had been excluded from the Council meeting on July 6, 1959 (609 H.C. Deb. 164–166, July 23, 1959).

Police

Chief Constable of Nottingham. The Home Secretary gave the terms of his reply to the Town Clerk of Nottingham who had informed the Home Secretary of the grounds on which the Chief Constable had been suspended from duty by the Watch Committee (609 H.C. Deb. 52, July 16, 1959).

Town and Country Planning

The Town and Country Planning (Grants) Regulations, 1959,

(1) provide for payment of Exchequer grants to local authorities in respect of—

- (a) (part II of the regulations) expenditure incurred in connection with the acquisition, clearing and preliminary development of land acquired under planning powers for war damage re-development and in respect of land appropriated to planning purposes for such redevelopment,
- (b) (part III) expenditure incurred in the payment of expenses in connection with restrictions on coal mining imposed by or under the Act of 1947; and

(2) determine the basis and method of calculation of such grants and lay down the terms and conditions of payment (S.I. 1959 No. 1610).

See also EDUCATION (above, p. 396), HIGHWAYS (above, p. 398), TOWN AND COUNTRY PLANNING (below, p. 414).

NATIONAL HEALTH SERVICE

Debate

The House of Commons debated the National Health Service in Committee of Supply on July 15, 1959 (609 H.C. Deb. 419-548). In the course of the debate, the Minister of Health said that the gross annual cost of the service in Great Britain was £718 million, and the cost to the Exchequer was £534 million.

NATIONAL INSURANCE

Decisions of the Commissioner and the Tribunal

Classification. The claimant, who attained the age of sixty-five on August 26, 1958, retired from the occupation of chemical works superintendent in 1949 and thereafter ran a small poultry farm. If that occupation was such that under the National Insurance Act, 1946, he could be included in the class of non-employed persons the fact that he had continued work at it would not preclude his being treated as retired. If on the other hand he was to be included in the class of self-employed persons while so working he could not, having regard to the amount of work involved, be treated as having retired. *Held*, that the question as to the class of insured persons into which claimant fell was a matter for the Minister to determine, and, as it was in claimant's interest, direction given to the insurance officer so to refer it for decision in accordance with Regulation 23 (2) of the Determination of Claims and Questions Regulations: Decision No. R(P) 4/59.

Leaving voluntarily. A claimant was discharged after one year's employment because he refused to join the firm's superannuation scheme. His reason was that he could not afford the weekly contribution. It was not shown that at the time of his engagement he knew he would be expected to join the scheme. *Held*, that although he "invited discharge" the claimant could not be regarded as having left voluntarily. Decision R(U) 4/51 compared: Decision No. R(U) 9/59.

Misconduct. Because of sickness a claimant had not returned to work from holiday by ten days after he was due back. Having sent no explanation he was then discharged while still sick. *Held*, that he had not been unable to send an explanation of his absence and that misconduct was proved. In deciding when disqualification should begin the period of sickness should be ignored. Applying principles established by the Umpire disqualification should run from the time he was discharged and not from the last day of actual work: Decision No. R(U) 11/59.

"*Normal course.*" Claimant appealed against disallowance of benefit for a Saturday under the "normal idle day" provisions.

Held, that in applying section 4 (1) of the National Insurance Act, 1957:

- (i) the burden of proof rests on the person who challenges the claim;
- (ii) it should first be ascertained whether there is evidence that the claimant's employment would *normally* be suspended on the day of claim itself;
- (iii) in the absence of such evidence his record of employment on the day of the week concerned during the preceding year, or some other more suitable period, should be examined;
- (iv) in that period holidays and days on which he was incapable of work or unemployed because his employment had been terminated should be disregarded;
- (v) if in the period examined the claimant worked on fewer than half of the reckonable occasions of the day of the week concerned, the day of claim should be held to be a day on which in the normal course he would not work: Decision No. R(U) 14/59.

Seasonal workers. A sharefisherman was employed more or less continuously for a period of five to seven months in each of the three years preceding the date of his claim. During the remainder of each year he had irregular short periods of employment, some of which were separated by breaks of more than seven days. *Held*, that in such circumstances it is appropriate to treat the whole of the period between periods of almost continuous employment as being, *prima facie*, an off-season. The occasional irregular work obtained in that period would count for the purposes of regulation 2 (1) (b) of the Seasonal Workers Regulations. In this case, in the period so treated, the claimant had had a "substantial amount of employment" in two of the three years preceding his claim. He had therefore not yet become a seasonal worker and was not required to satisfy the additional conditions in what would otherwise have been his current off-season. Decision R(U) 14/53 discussed; Decision No. R(U) 7/59.

A seasonal worker began employment in 1957 and 1958 abnormally early. In the two years preceding his claim he had failed to register for employment during periods of six, four, three and thirteen working days. *Held*, that in averaging the dates for establishing the commencement of the off-season (see Decision R(U) 29/51) the years 1957 and 1958 were abnormal and should be disregarded; the average of the years 1954, 1955 and 1956 was accepted. Also held that regulation 2 (1) (a) of the Seasonal Workers Regulations was not satisfied. A period of more than twelve (consecutive) days was not "inconsiderable" within the meaning of the regulation: Decision No. R(U) 10/59.

Subsidiary occupation. The claimant was under written contract to play football and attend for training "when required." He was paid 10s. per week, plus reimbursement of travelling expenses. Only part-time service was in fact required. *Held*, that the claimant was available for full-time employment as a warehouseman or packer and that the occupation of footballer was in his case consistent with that employment: Decision No. R(U) 8/59.

An unemployed factory worker obtained part-time work as a relief park-keeper. His hours of duty began at 4 p.m. each day. He had no reasonable prospect of obtaining full-time factory work finishing before 4 p.m. *Held*, that unemployment benefit was not payable while the claimant followed the occupation of relief park-keeper. The fact that he could leave the subsidiary occupation at any time without notice was not to the point. He could not re-arrange his hours as a park-keeper, and could only follow the full-time employment for which he was available by giving up the subsidiary occupation which was therefore clearly inconsistent with the full-time employment. Decision R(U) 11/54 distinguished; Decision No. R(U) 12/59.

Trade dispute. A haulage motorman employed in a colliery lost employment by reason of an unofficial stoppage of work which originated with brushers (piece workers). Some oncost workers took part in the dispute. Claimant contended that he belonged to a grade of workers who presented themselves for work and who did not participate in the dispute.

Held, that the claimant belonged to the *class* of oncost workers, some of whom participated in the dispute, and that he was thereby subject to disqualification. Not to the point that he belonged to a *grade* no member of which was participating: Decision No. R(U) 5/59.

Validity of marriage. The claimant was awarded an increase of retirement pension in respect of a woman said to be his wife, with whom he went through a ceremony of marriage in 1938. The award was reviewed when it became known that in 1910 he had been married to another woman in Ireland, and that marriage had not been terminated. He alleged that the 1910 marriage was invalid, because he was a Protestant and she a Roman Catholic; the ceremony took place in a Roman Catholic Church at 6 a.m. on a Sunday morning in the presence of only one witness. *Held*, that the

1910 marriage was a valid marriage. Section 39 of the Matrimonial Causes and Marriage Law (Ireland), 1870, provided that failure to comply with statutory formalities did not invalidate a marriage unless it was contracted in non-compliance knowingly and wilfully. There was non-compliance with formality but no clear evidence that the parties acted knowingly and wilfully. A ceremony of marriage followed by cohabitation is presumed valid in the absence of decisive evidence to the contrary: Decision No. R(P) 5/59.

National Assistance

The National Assistance Act, 1959 (7 & 8 Eliz. 2, c. 52), received the Royal Assent on July 9, 1959. It enables the Minister of Pensions and National Insurance to increase by order any of the amounts prescribed in paragraphs 3 and 5 of Schedule II of the National Assistance Act, 1948, relating to the amounts of capital and income to be disregarded in computing the resources of a person applying for National Assistance (section 1 (1)); any increases in amounts so made will have effect also for the purposes of the Legal Aid and Advice Act, 1949, and the corresponding Scottish Act (section 1 (1)); orders are to be made by the Minister by statutory instrument subject (except for instruments made before August 9, 1959) to affirmative resolution in both Houses of Parliament (section 1 (2)).

Public Service pensions

The Pensions (Increase) Act, 1959 (7 & 8 Eliz. 2, c. 50), received the Royal Assent on July 9, 1959. It increases certain pensions granted in respect of public service. The increases are in addition to those granted by earlier Pensions (Increase) Acts. Section 1 provides for the increase of specified pensions, with effect from August 1, 1959; conditions of eligibility for increase under the Pensions (Increase) Act, 1944, are re-enacted in relation to the new increases (section 1 (2)-(6)); section 2 deals with re-employed persons and repeals section 6 of the Pensions (Increase) Act, 1956, in relation to any period after August 1, 1959; the benefits of this Act and of the earlier Pensions (Increase) Acts may in certain cases be extended to other classes of persons (section 3); section 4 makes provision to ensure that certain police and fire service pensions not directly increased by this Act receive corresponding increases; sections 5 and 6 contain supplementary and financial provisions; section 7, interpretation.

The Ministry of Housing and Local Government has issued a circular explaining the Pensions (Increase) Act, 1959 (Circular No. 46/59).

Retirement pensions

The National Insurance Act, 1959 (7 & 8 Eliz. 2, c. 47), received the Royal Assent on July 9, 1959. It extends the existing flat-rate National Insurance scheme by providing, for employed persons, a system of contributions graduated according to earnings, with related graduated additions to retirement pensions. Employees with equivalent occupational pension rights may be contracted out of the graduated part of the scheme under Part II of the Act.

For employed persons over eighteen, other than those contracted out under Part II of the Act, the existing flat-rate contributions are replaced, as from a day to be appointed by the Minister, by the contributions specified in Schedule I of the Act, together with graduated contributions of 4½ per cent. each by employer and employee on weekly earnings between £9 and £15 (section 1 (1)); section 1 (2) provides for quinquennial increases in all these contributions, beginning in 1965; section 1 (3) provides for the contributions payable to the National Insurance Fund out of moneys provided by Parliament; sections 2 and 3 contain detailed provisions about graduated contributions; the remuneration on which they are to be calculated is, in general, the

same as that which ranks for deduction of income tax under the P.A.Y.E. system (section 2); the new contributions may under new regulations be collected by the Inland Revenue (section 3 (1)); any new regulations made may also extend this method of collection to other contributions, including Industrial Injuries and National Health Service contributions (section 3 (2)); section 4 provides for the graduated benefit which will normally take the form of an increase of the main retirement pensions payable, in general, at the same ages and on the same conditions as that main pension, at the rate of 6d. per week for each unit of graduated contributions paid by the employed person (section 4 (1)); these units are initially £7 10s. for men and £9 for women, but will be increased proportionately as and when contributions are increased under section 1 (2) of the Act (section 4 (3)); provision is made for persons who do not retire from pensionable employment at pensionable age (section 4 (5)); section 5 enables a widow who has reached pensionable age and retired to receive half the graduated benefit which her husband earned, in addition to any graduated benefit earned by her own contributions; section 6 increases the increments which persons can earn on their existing flat-rate retirement pensions by postponing retirement; the number of contributions required for each increment is reduced so that, after a day to be appointed, an increment of 1s. will be earned by each twelve contributions paid after deferred retirement; a wife drawing a pension on her husband's insurance will also receive an increment of 6d. (increased to 1s. on her husband's death) for each twelve contributions paid by her husband while both of them were over pensionable age; section 7 contains general provisions as to non-participating employment and, in particular, section 7 (1) provides that a person in a non-participating employment shall only pay the existing flat-rate contributions; no employment is a non-participating employment unless the employee's service in it qualifies him for retirement benefits under some occupational scheme which are as favourable as those derived from graduated contributions under the Act (section 7 (2)); section 7 (3) provides that if there are no arrangements in the occupational scheme itself for preserving an employee's rights when he ceases to be in a non-participating employment the employer is liable for a payment in lieu of contributions which will buy graduated pension rights under the National Insurance scheme at the maximum rate for the period of non-participating employment; section 8 contains further provisions as to the treatment of employments as non-participating employments, and, in particular, section 8 (4) specifies the requirements for recognition of an occupational superannuation scheme under the Act; sections 9-11 contain further provisions as to payments in lieu of contributions and provide that an employer may recover a certain part of any such payment from any refund of contributions which would otherwise be due to the employee from the occupational scheme (section 10); payments in lieu of contributions are to be paid in priority to other debts on bankruptcy or insolvency (section 11); section 12 contains special provisions for certain statutory superannuation schemes relating to teachers, local government officers, police and persons employed in the National Health or fire services; section 13 provides for adjudication as to whether particular employments are non-participating by a registrar with rights of appeal to an adjudicator, and for the making of the necessary regulations; an adjudicator is disqualified from sitting in the House of Commons (section 13 (4)); section 14 provides that the Act is to be construed as one with the National Insurance Act, 1946, and provides for the exercise of certain powers of modifying provisions in special classes of case in relation to this Act; section 15 provides for the modification of superannuation schemes under section 69 of the 1946 Act; section 16 provides for the making, variation and revocation of orders and regulations under this Act which are to be made by statutory instrument; section 17 contains financial provisions; section 18 provides for disclosure of information by the Inland Revenue for the purpose of calculating and

collecting graduated contributions under this Act; this Act is included among the Acts which may be cited together as the National Insurance Acts, 1946 to 1959 (section 19 (1)); section 19 (3) enables the Parliament of Northern Ireland to enact corresponding legislation.

The Act, which extends to Scotland, but except insofar as it expressly refers to Northern Ireland, not to Northern Ireland, came into force on July 9, 1959; section 6 came into force on August 3, 1959, but the graduated contributions (section 1) do not come into force until a day to be appointed by the Minister.

The National Insurance Act, 1959 (Commencement) Order, 1959, appoints August 3, 1959, to be the day after which unpaid pensions increases can be earned by postponing retirement under section 6 (3) of the National Insurance Act, 1959 (S.I. 1959 No. 1212).

NATIONAL INSURANCE (INDUSTRIAL INJURIES)

Decisions of the Commissioner and the Tribunal

"Out of and in the course of employment." A coal miner injured himself when he caught his foot in an iron grid at the entrance to the colliery canteen, half an hour before his shift was due to commence. He intended to buy a cake of soap from the canteen to use in the pit-head bath at the end of his shift. *Held*, that the accident did not arise out of and in the course of the claimant's employment. His act was only incidental to that which was itself incidental to his employment, and was not something incidental to the performance of what he was employed to do. Decision R(I) 72/54 distinguished, and R(I) 11/54 followed: Decision No. R(I) 7/59.

A locomotive driver intended to return by a particular train to his home depot where he was due to sign off on completion of his shift. He was late reaching the locomotive sheds, and, to try and get to the station in time, took an unauthorised short cut along the railway tracks. He was killed by a passing locomotive. *Held*, that under section 8 the accident could be deemed to have arisen out of and in the course of the deceased's employment. The journey from the shed to the station lay within the scope of his employment and was made in pursuance of his employers' business. Decision R(I) 25/55 compared: Decision No. R(I) 8/59.

A level crossing keeper, who resided with her husband and had her home in a gatehouse which was the property of her employers, British Railways, injured her wrist when walking down the garden path of the gatehouse to fetch milk for household purposes. Her duties comprised opening and shutting the gates to traffic, keeping the lamps lit at night and reporting any untoward event at the crossing. She was required by her employers to reside in the gatehouse and to remain in or near it except for certain specified periods (the accident did not happen during one of these periods) when some other person was available to perform her duties. *Held*, that the accident did not arise out of and in the course of the claimant's employment. The gatehouse, although the property of her employers, was the claimant's home and, there being no sufficient nexus between the accident and the claimant's employment, her act of fetching the milk was properly incidental not to her employment but to the taking of a meal in her own home: Decision No. R(I) 9/59.

Regular occupation. Claimant was a hosiery trimmer working on woollen goods. After an industrial accident, he continued in the same employment, but was unable because of his disability to work on a new process of trimming synthetic goods. Trimmers of synthetics required a higher degree of skill, were paid higher wages, and had better opportunities of employment than trimmers of woollen goods. *Held*, that claimant had failed to prove that, as the result of the relevant loss of faculty, he was incapable of following

his regular occupation. Although it was right that a man's regular occupation should be held to include techniques which were in their infancy at the time of his accident and of which he had no practical experience, there was no evidence that hosiery employers required trimmers to be able to do all types of trimming: Decision No. R(I) 10/59.

Special hardship allowance. A plasterer suffered from defective vision of his right eye after lime dust had entered it. He continued to be employed as a plasterer for various periods after the accident until he gave up this occupation through fear of injuring his left eye. *Held*, that claimant had not proved that by reason of the relevant loss of faculty he was incapable of following his regular occupation. He had demonstrated that binocular vision was not essential for a plasterer, and he would not become totally blind if he lost the sight of his left eye, since his right eye was only partially affected. (R(I) 8/56 followed): Decision No. R(I) 6/59.

NATIONALISED INDUSTRIES

General

Debate. On July 15, 1959, the House of Lords debated the fuel and power industries (218 H.L. Deb. 10-70).

Finance. Section 36 of the Finance Act, 1959 (7 & 8 Eliz. 2, c. 58), amends previous legislation (see [1958] P.L. 396) by increasing the permitted total of advances from £1,070 million to £1,620 million and by extending the period to the end of August, 1960.

Airways

Guarantee. The Treasury has issued statements of guarantee on loans proposed to be raised by British European Airways Corporation and British Overseas Airways Corporation (H.C. 278, 279 of 1958-59).

Report and accounts of British European Airways Corporation for 1958-59 have been published (H.C. 258 of 1958-59).

See also PARLIAMENT (below, p. 409).

Coal

Debate. On July 23, 1959, the House of Commons debated the coal industry (609 H.C. Deb. 1543-1668).

Electricity

Guarantees. The Treasury has issued statements of guarantee on loans proposed to be raised by the Electricity Council, the North of Scotland Hydro-Electric Board and the South of Scotland Electricity Board (H.C. 280, 282, 283 of 1958-59).

Reports and accounts of the Area Boards, the Electricity Council and the Generating Board for 1958-59 have been published (H.C. 300-313 of 1958-59) with the report of the Minister of Power (H.C. 314 of 1958-59).

Gas

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the Gas Council (H.C. 281 of 1958-59).

Transport

Guarantee. The Treasury has issued a statement of guarantee on loans proposed to be raised by the British Transport Commission (H.C. 284 of 1958-59).

Modernisation and re-equipment. The British Transport Commission has published a report on its modernisation programme. The two main proposals in the report are: to close many more uneconomic branch lines and stations, and to increase the annual rate of investment.

In the four years 1955-58, £421 million was spent on railway modernisation. This included £159 million on freight vehicles, £123 million on permanent way, works, plant and machinery, £94 million on coaching vehicles and £45 million on locomotives.

Referring to future modernisation plans, the report states: "The essential requirement of the next five years is that a more compact railway system and a more economic scale of operations shall be achieved more quickly." To obtain this, route mileage will be reduced by about 10 per cent. (1,800 miles) and more than 800 stations will be closed, together with a reduction in rolling stock of 5,500 locomotives, 7,000 passenger vehicles and 250,000 freight vehicles.

For the period 1960-63, investment will be increased to between £190 million and £210 million a year, compared with the 1959 rate of £180 million. This increase will enable colour light signalling to be installed on a further 3,000 miles of track, extensions to be made to the automatic warning control system, and the improvement of passenger and freight handling facilities to be undertaken. With regard to the electrification programme, the report states: "It is hoped to accelerate, by one or two years, the date for completing the whole of the electrification of the London Midland Region main line from Euston to Birmingham, Crewe, Liverpool and Manchester," and "By 1963 more than three-quarters of the passenger train mileage is likely to be operated by electric or diesel traction."

The B.T.C. expect that, in 1963, compared with 1957, net freight receipts will be increased by between £5 million and £35 million, passenger receipts by £50 million to £70 million and receipts from other activities by £10 million. There will be an estimated increase in track, signalling and general administration expenses of £10 million, resulting in a working surplus of between £50 million and £100 million to pay interest charges estimated at £85 million. (Cmnd. 813; this report and the annual reports and accounts of the Commission for 1958 (see above, p. 321) were debated in the House of Commons on July 29, 1959 (610 H.C. Deb. 512-632).)

See also PARLIAMENT (below).

PARLIAMENT

Estimates Committee (House of Commons)

Reports. The Select Committee has published its 8th Special Report being the observation of the Admiralty on the Reserve Fleet (H.C. 228 of 1958-59); its 1st Report (on Trunk Roads) (H.C. 223 of 1958-59); its 2nd Report (on Sale of Military Equipment Abroad) (H.C. 229 of 1958-59); its 3rd Report (on the Commonwealth Relations Office) (H.C. 252 of 1958-59); its 4th Report (on the Medical Services of the Armed Forces) (H.C. 253 of 1958-59); and its 5th Report (on the Production, Development and Engineering Groups of the United Kingdom Atomic Energy Authority) (H.C. 316 of 1958-59).

The Minister of Transport and Civil Aviation was criticised in the House of Commons on July 29, 1959, for his comments in two public speeches on the 1st Report of the Committee (610 H.C. Deb. 497-502).

Nationalised Industries

The Select Committee on Nationalised Industries (Reports and Accounts) published a report on the Air Corporations (H.C. 213 of 1958-59). The Minister of Transport and Civil Aviation has stated his views on the principal points in that report (610 H.C. Deb. 73-74, July 29, 1959).

The Select Committee published a Special Report on the need for additional assistance being given to the Committee for its work (H.C. 276 of 1958-59).

Procedure

House of Commons. On July 13, 1959, the report from the Select Committee on Procedure (see above, p. 322) was debated (609 H.C. Deb. 36-168).

House of Lords. The Select Committee appointed to consider the procedure of the House has presented its Second Report. It recommended, *inter alia*, that private business should be taken immediately after Starred Questions (H.L. (172) of 1958-59).

Prorogation and Dissolution

On September 18, 1959, Her Majesty's Speech on the prorogation of Parliament was delivered to both Houses by The Lord Chancellor. This ended the Fourth Session (opened October 28, 1958) of the Forty-first Parliament of the United Kingdom of Great Britain and Northern Ireland (610 H.C. Deb. 794-798; 218 H.L. Deb. 926-932). On the same day, Parliament was dissolved.

Speaker

On September 18, 1959, Mr. Speaker Morrison spoke to the House of Commons on his retirement. The Prime Minister moved the thanks of the House (610 H.C. Deb. 787-794).

Public Accounts Committee (House of Commons)

Report. The Committee has published its 3rd Report (H.C. 248 of 1958-59).

Statutes

Royal Assent. The Fire Services Act, 1959 (see above, p. 401), the National Assistance Act, 1959 (see above, p. 405), the Pensions (Increase) Act, 1959 (see above, p. 405), and the National Insurance Act, 1959 (see above, p. 405), received the Royal Assent on July 9, 1959; the Town and Country Planning Act, 1959 (see below, p. 414), received the Royal Assent on July 16, 1959; the Education Act, 1959 (see above, p. 396), the New Towns Act, 1959 (see below, p. 411), and the Colonial Development and Welfare Act, 1959 (see below, p. 417), received the Royal Assent on July 29, 1959.

PUBLIC AUTHORITIES

Bank of England

Report for 1958-59 has been published (Cmnd. 801).

Cinematograph Films Council

Report for 1958-59 has been published (H.C. 246 of 1958-59).

Forestry Commission

Report for 1957-58 has been published (H.C. 274 of 1958-59).

Herring Industry Board

Report for 1958 has been published (Cmnd. 787).

National Film Finance Corporation

Report and accounts for 1958-59 have been published (Cmnd. 799).

New Towns Commission

The New Towns Act, 1959 (7 & 8 Eliz. 2, c. 62), received the Royal Assent on July 29, 1959.

The principal purpose of this Act is to reverse the policy contained in the New Towns Act, 1946, for the eventual dissolution of the New Towns Development Corporations and the vesting of their assets in the local authorities for the towns concerned. The new Act sets up a new body, the Commission for the New Towns, for the purpose of "taking over, holding, managing and turning to account the property previously vested in" the development corporations. Part I is mainly concerned with the constitution and functioning of the Commission and Part II makes minor amendments in the provisions of the Act of 1946 during the period of continued existence of the Development Corporations.

Part I (sections 1-10). Disposal of Undertakings of Development Corporations and Related Matters. Section 1 provides that the provisions of section 15 of the Act of 1946 with regard to disposal of assets of development corporations are not to have effect and are to be replaced by the provisions of Part I. Section 2 establishes the Commission for the New Towns, defines its functions and provides that it is to comply with any direction given by the Minister of Housing and Local Government. The Commission is not to be regarded as an agent of the Crown. Section 3 authorises the Minister to make advances to the Commission up to £5 million on capital account and £1 million on revenue account. Section 4 authorises the payment by the Minister of housing subsidies and certain housing grants to the Commission in the same way as they can be paid to local authorities, and excludes tenancies granted by the Commission from the Rent Acts. Section 5 provides for the keeping and auditing of the accounts of the Commission. Section 6 provides for the vesting of the property of a development corporation in the Commission and the dissolution of corporations by order of the Minister. Section 7 provides for transfer of sewerage and sewage disposal undertakings of development corporations to the public health authority for the area. Section 8 empowers local authorities to do work on behalf of the Commission. Section 9 deals with local inquiries, superannuation, private street works, stamp duty on transfers of property, licensing provisions and other miscellaneous matters. Section 10 provides for the payment of expenses arising out of the provisions of the Act.

Part II (sections 11-14). Miscellaneous. Section 11 raises the limit of advances by the Minister to development corporations from £300 million to £400 million. Section 12 authorises the Minister to withhold or reduce housing subsidies to development corporations in respect of houses sold or leased for terms of more than one year to a person other than a local authority. Section 13 authorises development corporations to make contributions towards the provision of amenities in their towns.

Schedule 1 prescribes the constitution of the Commission.

Schedule 2 contains detailed provisions for the transfer of property from development corporations to the Commission.

Optical Council

The Opticians Act, 1958 (Commencement No. 2) Order, 1959, brings into operation, as from September 1, 1959, further provisions of the Opticians Act, 1958, and in particular—

- (a) provisions with respect to the establishment by the General Optical Council of registers of ophthalmic and dispensing opticians and lists of bodies corporate carrying on business as opticians;
- (b) provisions concerning qualifications for registration or enrolment (S.I. 1959 No. 1316).

The General Optical Council (Registration and Enrolment Rules) Order in Council, 1959, has been made.

The Opticians Act, 1958, requires the General Optical Council to keep registers of ophthalmic and dispensing opticians and lists of bodies corporate carrying on business as such opticians. The rules approved by this Order include provisions as to the form of these registers and lists, the procedure for the entry, removal or restoration of names, and the various fees payable to the Council (S.I. 1959 No. 1432).

White Fish Authority

Registration. The White Fish Authority (Registration of Wholesale Merchants) (Revocation) Regulations Confirmatory Order, 1959, confirms Regulations made by the White Fish Authority revoking Regulations previously made for the registration of wholesale merchants other than wholesale merchants selling only at first-hand, engaged in the white fish industry (S.I. 1959 No. 1109).

The White Fish Authority (Registration of Retail Merchants and Fish Friers) (Revocation) Regulations Confirmatory Order, 1959, confirms Regulations made by the White Fish Authority revoking Regulations previously made for the registration of retail merchants and fish friers engaged in the white fish industry (S.I. 1959 No. 1110).

Report and accounts of the Authority for 1958-59 have been published (H.C. 230 of 1958-59).

REMEDIES

Certiorari

Section 48 (5) of the Licensing Act, 1953, makes it necessary that, on an application for certiorari to quash a decision of licensing justices on the ground of bias, a real likelihood of bias be shown, whether arising from a substantial pecuniary interest or otherwise.

An application by a co-operative society for a licence to sell spirits came first before seven magistrates, five of whom were members of the society. The spouses of the other two were members. The application was adjourned and was later granted by seven magistrates, of whom six were members of the society and the other the wife of a member. The chairman on both occasions had been a candidate for election to a directorship in the society. In an application to quash the licence on the ground of bias it was not contended that any magistrate was biased in fact or that the interest of any magistrate was so large as to create any risk of bias. *Held*, that the members of the society were disqualified from acting by s. 48 (4), but (Salmon J. dissenting) that certiorari would issue only if a real likelihood of bias was proved and accordingly should not be granted: *R. v. BARNSLEY LICENSING JUSTICES, ex p. BARNSLEY AND DISTRICT LICENSED VICTUALLERS' ASSOCIATION* [1959] 3 W.L.R. 96; [1959] 2 All E.R. 635, D.C.

Declaration

A declaration may be made that planning permission is not needed for a particular piece of proposed development.

The Malvern Conservators and a granite quarrying company entered into heads of agreement whereby the company was to be allowed to quarry in certain areas. This agreement was "confirmed and made binding" by section 54 of a private Act, the Malvern Hills Act, 1924, whose last words are "the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement." The private Act applied to "all lands common or waste" over which the Conservators had rights. The company applied for

planning permission to quarry in certain land other than common or waste land which they were authorised to quarry by the heads of agreement. When this was refused the company brought an action against the Ministry of Housing for a declaration that no special consent was needed, arguing that the quarrying was development for which general permission had been given by Article 3 and Schedule 1, Class xii of the Town and Country Planning General Development Order, 1950, as "Development authorised by any local or private Act of Parliament. . . ." *Held*, that such a declaration should be granted. The private Act applied to land whether or not it was waste or common land and, in view of the quoted words of section 54, it "authorised" the development. Section 17 of the Town and Country Planning Act, which provided for an application to the Minister to determine whether planning permission was needed, did not oust the jurisdiction of the court to make such a declaration: *PYX GRANITE CO. v. MINISTRY OF HOUSING AND LOCAL GOVERNMENT* [1959] 3 W.L.R. 346; [1959] 3 All E.R. 1, H.L., reversing decision of Court of Appeal.

Habeas Corpus

The Court of Appeal has no appellate jurisdiction, under section 31 (1) of the Judicature Act, 1925, over a case involving a "criminal cause or matter," and a refusal by the Divisional Court to grant an order of habeas corpus *ad subjiciendum* does not sufficiently differentiate such a case for an appeal to come within the jurisdiction of the Court of Appeal.

The applicant, H., who was undergoing a sentence of corrective training, applied to the Divisional Court for a writ of habeas corpus on the ground that his detention was unlawful. The court refused the application, and the appeal from that decision to the Court of Appeal was dismissed on the ground that it was a "criminal cause or matter" and the Court of Appeal had no jurisdiction. H. made a further application to a differently constituted Divisional Court of the Queen's Bench Division and then an application to the Divisional Court of the Chancery Division, both of which were refused. On appeal from the latter decision *held*, that the essential subject-matter raised by the application for an order of habeas corpus, the question whether H. was lawfully detained, was an appeal involving a "criminal cause or matter" within section 31 (1) of the Judicature Act, 1925, and it followed that no appeal would lie to the Court of Appeal: *Re HASTINGS* (No. 3) [1959] 1 W.L.R. 807, affirming decision of Divisional Court.

See also *COURTS* (above, p. 396).

SUBORDINATE LEGISLATION

Parliamentary proceedings

Select Committee on Statutory Instruments (House of Commons). On July 7, 14 and 21, 1959, the Committee considered 32, 7 and 19 instruments respectively and resolved that it was unnecessary to draw the special attention of the House to them. The Committee asked for an explanation from a government department in respect of one instrument (H.C. 5-XV, 5-XVI, 5-XVII of 1958-59).

Special Orders Committee (House of Lords). In the Ninth, Tenth, Eleventh and Twelfth Reports the Committee examined twenty-one instruments. The Committee found that seven of these instruments raised important questions of policy and principle and required the special attention of the House, that one was not founded on precedent, but that no further special inquiries were necessary before the House decided whether to approve (H.L. (134) (150) (171) (175) of 1958-59).

TOWN AND COUNTRY PLANNING

Statute

The Town and Country Planning Act, 1959 (7 & 8 Eliz. 2, c. 53), received the Royal Assent on July 16, 1959. It distinguishes between compensation payable on the compulsory purchase of land and compensation payable on the imposition of planning restrictions. For the latter, compensation is still to be calculated in accordance with Part II of the Town and Country Planning Act, 1954, but as to compensation payable on the compulsory purchase of land, this Act reinstates, with modifications, the market value rate of compensation established in 1919, in place of the existing-use value plus 1947 development value rate of compensation, as established by the Town and Country Planning Act, 1954. The Act also makes provision for the acquisition, appropriation and disposal of land by public authorities free, in certain circumstances, of the controls at present exercisable over such acts by the Minister of Housing and Local Government. Further opportunity is given under the Act for appeals against refusals of planning permission and for fuller representations to be made by interested parties concerning planning applications in respect of certain classes of prescribed development. Owners of land subject to an application for planning permission are also given greater opportunity to make their opinions felt. Part IV of the Act contains miscellaneous and supplementary provisions relating to the obligation now laid upon local authorities to purchase property which has become virtually unsaleable as a result of some provision contained in a development plan; compensation for damage to requisitioned land; and the acquisition of land by public authorities and Ministers in advance of their immediate requirements.

The Ministry of Housing and Local Government has issued a Circular explaining the provisions of the Town and Country Planning Act, 1959 (Circular No. 48/59).

TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

Lands Tribunal

See LOCAL GOVERNMENT, *Finance, Rating and Valuation* (three references) (above, p. 400).

National Assistance Tribunal

Determination of need. The National Assistance (Determination of Need) Amendment Regulations, 1959, which amend the National Assistance (Determination of Need) Regulations, 1948, provide for increases in the weekly sums allowed for requirements, other than rent, for the purpose of determining the need of applicants for assistance under the National Assistance Act, 1948. They make the rent allowance for a householder the net rent payable or such part as is reasonable in the circumstances, so that in no case will the former restriction by reference to the level of rents in the locality apply. They increase the permissible rent allowance for persons who are not householders. They also increase the amount of earnings to be disregarded and vary the method of assessing the contributions towards the expenses of the household which are taken to be made by members of it who are not dependants of the householder.

Regulation 2 of the principal regulations as now amended refers to the provisions of the Second Schedule to the National Assistance Act, 1948, as to the disregarding of assets and those provisions are therefore no longer repeated in the Regulations. Such of the previous amending Regulations as are spent are revoked. The only other amendments made are of a minor or drafting nature (S.I. 1959 No. 1241).

National Insurance and Industrial Injuries Tribunals

Commencement. The Family Allowances and National Insurance Act, 1959 (Commencement) Order, 1959, has been made. It orders that section 2 of the Act shall come into force on September 28, 1959 (S.I. 1959 No. 1595).

Determination of claims and questions. The National Insurance (Determination of Claims and Questions) Amendment (No. 2) Regulations, 1959, have been made.

In consequence of the transfer, pursuant to section 1 of the Family Allowances and National Insurance Act, 1959, of the functions of determining questions as to the right to allowances arising under the Family Allowances Act, 1945, from the Minister of Pensions and National Insurance with appeal to referees appointed under that Act to insurance officers or local tribunals subject to appeal to the Commissioner appointed under the National Insurance Act, 1946, certain provisions of the National Insurance (Determination of Claims and Questions) Regulations, 1948, have become inappropriate. Part II of these Regulations amends regulations 2, 6, 11 and 18 of those regulations so as to take account of the provisions of the Family Allowances (Determination of Claims and Questions) Regulations, 1959, whereby such transfer is effected.

By Part III of these Regulations the ordinary system of adjudication for matters arising under the National Insurance Act, 1946, is, with the necessary modifications, made applicable to transitional matters arising under that Act, in place of the special system prescribed by the National Insurance (Determination of Claims and Questions) (Transitional) Regulations, 1948, which are revoked (S.I. 1959 No. 1154).

The preliminary draft of these Regulations were submitted to the National Insurance Advisory Committee in accordance with section 77 of the National Insurance Act, 1946 (H.C. 244 of 1958-59).

The National Insurance (Industrial Injuries) (Determination of Claims and Questions) Amendment Regulations, 1959, revoke regulation 5 and regulation 20 of the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948.

In consequence of the transfer, in pursuance of section 1 of the Family Allowances and National Insurance Act, 1959, of the responsibility for the determination of questions under the Family Allowances Act, 1945, from the Minister of Pensions and National Insurance, with the right of appeal to Referees, to insurance officers, local tribunals and the Commissioner appointed under the National Insurance Act, 1946, regulation 5 of the Regulations of 1948, which modifies provisions of the old Family Allowances adjudication system in their application to the determination of certain questions arising under the National Insurance (Industrial Injuries) Act, 1946, has become redundant.

Section 3 of the Act of 1959 provides that leave shall not be required for an appeal to the Industrial Injuries Commissioner from a decision of a local appeal tribunal constituted for the purposes of the National Insurance (Industrial Injuries) Act, 1946, and accordingly regulation 20 of the Regulations of 1948, which contains provisions as to the manner in which and time within which applications for such leave were to be made, is no longer required (S.I. 1959 No. 1156).

The Family Allowances (Determination of Claims and Questions) Regulations, 1959, give effect to the provisions of section 1 of the Family Allowances and National Insurance Act, 1959, relating to the determination of questions as to the right to allowances under the Family Allowances Act, 1945. Regulation 2 provides for such questions to be determined by insurance officers or local tribunals subject to appeal to the Commissioner appointed under the National Insurance Act, 1946; for this purpose certain provisions of the National Insurance (Determination of Claims and Questions) Regulations, 1948, are applied with modifications. This regulation reserves to the

Minister of Pensions and National Insurance certain questions as to which of two or more persons is to be treated as maintaining a child or in which of two families a child is to be treated as included. Provision is made by regulations 3 and 4 for the review of decisions, by regulations 5 and 6 for the adjustment and recovery of sums paid on account of allowances and by regulation 7 for payment pending appeals. Regulation 8 contains provisions to facilitate the transition from the system of adjudication provided by section 5 of the Family Allowances Act, 1945 (which, subject to such provisions, is repealed by the Family Allowances and National Insurance Act, 1959), under which questions as to the right to allowances were determined by the Minister with appeal to referees appointed for the purpose (S.I. 1959 No. 1157).

The National Insurance (Industrial Injuries) (Determination of Claims and Questions) Amendment (No. 2) Regulations, 1959, add to the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948, provisions governing procedure for appeal or reference to the Industrial Injuries Commissioner on a point of law from a medical appeal tribunal under the National Insurance (Industrial Injuries) Act, 1946. The right of appeal to the Commissioner is provided by the Family Allowances and National Insurance Act, 1959, and is exercisable in relation to decisions of medical appeal tribunals given on or after September 28, 1959.

The Regulations prescribe the manner in which, and time within which, applications for leave to appeal are to be made and appeals are to be brought, and the form in which a question of law and the facts upon which it arises are to be submitted to the Commissioner. Provision is also made for such matters as the oral hearing of appeals, references and applications, rights of audience and representation and the giving of reasons for, and notification of, decisions (S.I. 1959 No. 1596).

National Insurance Adjudicator. The Tribunals and Inquiries (National Insurance Adjudicator) Order, 1959, brings under the direct supervision of the Council on Tribunals an adjudicator appointed under section 13 of the National Insurance Act, 1959, and provides for an appeal from such an adjudicator to the High Court or the Court of Session on a point of law (S.I. 1959 No. 1267).

Pensions Appeal Tribunals

Procedure. The Pensions Appeal Tribunals (England and Wales) (Amendment) Rules, 1959, amend the rules governing the procedure of the Pensions Appeal Tribunals by increasing the fees which may be paid to medical specialists and the expenses which may be allowed to appellants in respect of medical witnesses and reports (S.I. 1959 No. 1340).

Performing Right Tribunal

The Performing Right Tribunal (Amendment) Rules, 1959, prescribe certain minor amendments in the procedure to be followed before the Performing Right Tribunal. Rule 8 will enable the Chairman to give directions at an early stage of the proceedings on the lines of the summons for directions which is familiar in civil proceedings in the courts (S.I. 1959 No. 1170).

Transport Tribunal

The British Transport Commission (Passenger) Charges Scheme, 1959, has been confirmed by Order dated July 8, 1959 (H.M.S.O. 88-819).

See also INQUIRIES (above, p. 399).

COMMONWEALTH AND DEPENDENT TERRITORIES

General

Colonial development. The Secretary of State for the Colonies has published a table showing the estimated unspent balances remaining in the various central and territorial allocations on March 31, 1959, the allocations of the new funds made available under section 1 of the Colonial Development and Welfare (Amendment) Act, 1959 (see above, p. 330), and the total sums available for expenditure in the period ending March 31, 1964 (609 H.C. Deb. 136-141, July 23, 1959).

On July 27, 1959, the House of Lords debated the report of the Colonial Development Corporation for 1958 (see above, p. 330) (218 H.L. Deb. 543-584).

The Colonial Development and Welfare Act, 1959 (7 & 8 Eliz. 2, c. 71), received the Royal Assent on July 29, 1959. By section 1, the Secretary of State may with the concurrence of the Treasury make schemes to promote the development of a colony or the welfare of its people. Section 2 provides that, with Treasury approval, loans may be made to any colonial government for the purposes of any approved development programme. Section 3 provides that sums and loans required for the purpose of development schemes shall be issued out of the Consolidated Fund. Section 4 lays down financial and time limits for schemes and loans. Section 5 requires that the Secretary of State be satisfied as to labour conditions in the colony. Section 6 provides for schemes relating to territories which cease to be colonies. Section 7 provides that no payment be made in pursuance of a scheme to government funds to the Tanganyika Agricultural Corporation. Section 8 concerns accounts and returns. Section 9 defines "colony" for the purposes of the Act. Section 10 and the Schedule to the Act provide for repeal and savings of earlier enactments.

Aden

The Aden Colony (Amendment) Order, 1959, restricts the application of the Aden Colony Order, 1936, as amended, in relation to the Island of Perim and the Kuria Muria Islands (S.I. 1959 No. 1297).

The Perim Order in Council, 1959, makes provision for the government of the Island of Perim (S.I. 1959 No. 1298).

Basutoland

The Basutoland, Bechuanaland Protectorate and Swaziland (Office of High Commissioner) Order in Council, 1959, formally establishes the Office of High Commissioner for Basutoland, the Bechuanaland Protectorate and Swaziland and provides for matters connected with the government of these Territories (S.I. 1959 No. 1620).

Bechuanaland

See **Basutoland** (above).

British Honduras

The Report for 1957 has been published by the Colonial Office (H.M.S.O. 58-1-8-57).

Cyprus

After the agreement on the future of Cyprus was signed in London on February 19, 1959, three committees were set up to work out the final arrangements for the creation of a new, independent Republic of Cyprus and

the retention under United Kingdom sovereignty of two areas on the island occupied by British bases. The three committees were the Joint Constitutional Commission, the Transitional Committee and the Joint Committee in London.

The Joint Constitutional Commission meets in Cyprus to prepare a draft constitution incorporating the basic governmental structure already agreed. It has four members representing the Greek Government, three representing the Turkish Government, four representing Greek-Cypriots and two representing Turkish-Cypriots. It has a Greek-Cypriot, a Turkish-Cypriot and a neutral legal adviser.

The Transitional Committee also meets in Cyprus, and among its fourteen members includes the Governor, Sir Hugh Foot, Archbishop Makarios and Dr. Kutchuk. It has to draw up plans for adapting and re-organising the government machinery in Cyprus in preparation for the transfer of authority.

The Joint Committee in London has the responsibility for preparing the final treaties giving effect to the conclusions of the London conference. It will prepare drafts for submission to governments, covering, amongst other things, the retention of areas in Cyprus under British sovereignty, questions of nationality, and financial and economic problems arising from the creation of an independent Cyprus. Its members are the United Kingdom Minister of State for Foreign Affairs, the Greek Ambassador, the Turkish Ambassador, a Greek-Cypriot and a Turkish-Cypriot representative.

During the period prior to the transfer of authority to the new Government of the Republic of Cyprus, which is expected to be completed by February 19, 1960, final responsibility for the administration of the island rests with the Governor, and the Governor is advised by his Executive Council. The Governor, however, has sought to share the responsibility of administration as far as possible with the Transitional Committee, and accordingly regular meetings have taken place attended by members of the Executive Council and of the Transitional Committee sitting together as a Joint Council. Members of the Transitional Committee have assumed responsibility for particular departments and functions of government.

The following statement by the Governor of Cyprus, Sir Hugh Foot, on August 19, 1959, sums up the progress made in the previous six months in the creation of the new Republic of Cyprus.

"The London Agreement was signed at Lancaster House six months ago today. Each month since the agreement was made I have made a public report on the progress made.

In March I was able to report that it had been a good first month. We cleared and closed the detention camps. We declared and carried out the terms of an amnesty. We cancelled the main emergency regulations.

In April, I reported that we had kept up the pace of advance. The London Committee and the Constitutional Commission having been established, we, here, made the appointments to the Transitional Committee. We agreed on the distribution of ministerial duties. We started meetings of the Joint Council, in which members of the Executive Council and the Transitional Committee regularly meet and work together.

In May the outstanding event was the meeting of the Greek and Turkish Prime Ministers and Foreign Ministers in Ankara. They reaffirmed their determination to co-operate wholeheartedly with Great Britain in putting into effect the agreements reached at Zurich and London, and I said in my May report that I vouched for the fact that, here in Cyprus, the leaders of the Greek and Turkish communities were equally determined to honour the agreements.

In June I was able to report that trade was improving, incidents of bad feeling were fewer and that the Joint Council and the new ministers had made an excellent start. I was also able to report, after my visit to London, that the people of Great Britain were keenly anxious to see the agreements

successfully worked out, and that Her Majesty's Government were prepared to give practical help to Cyprus. Immediate grants totalling £1 million were made by Great Britain for works in Cyprus.

In July Great Britain announced its readiness to give financial assistance to the Republic of Cyprus and, in particular, to finance three major projects—the new airport at Nicosia, the new port at Famagusta and the extension of electricity services. The Joint Council decided and declared that Cyprus will remain in the sterling area. In my report on July 19 I said that there was a strong stream leading to success, and that that stream gathered strength as the months went by. I said that I felt sure that the stream would sweep away anyone who sought to revive a spirit of hatred and conflict.

Now, as we reach the half-way mark, I feel that we can be proud of the constructive work we have so far done together, and I pay my sincere respects to all those who are engaged in the practical work of building the new republic.

We don't want a quiet life in 1959. We want to bring whatever difficulties there are out into the open and settle them now. If there are going to be rough passages let them come early rather than late—so that the new republic can start next year in clear water and good weather.

While the London Committee and the Constitutional Commission press on to conclusions with their urgent consideration of complicated questions, we have worked month by month to restore normal conditions, construct the machinery of a new system of government and create economic conditions which can lead to greater prosperity.

... There are still several main problems unsolved. The Greek and Turkish communities still have some way to go before full trust and co-operation between them are achieved. But the first half of the transitional year has gone well. I feel more confident now because I believe that the people of Cyprus have made up their minds. They are now more determined than ever to overcome obstructions and to succeed in the establishment of a free and independent republic within six months from now" (Commonwealth Survey, C.O.I., September 15, 1959).

East Africa

The report of the High Commissioner for 1958 has been published by the Colonial Office (H.M.S.O. 58-331-0-58).

Gambia

The Gambia (Legislative Council—Extension of Duration) Order in Council, 1959, extends from five to six years the period from the date of the return of the first writ at a general election held under the Gambia (Constitution) Order in Council, 1954, at the end of which the Governor must dissolve the Legislative Council, if it has not been sooner dissolved (S.I. 1959 No. 1300).

Hong Kong

The report for 1958 has been published by the Colonial Office (H.M.S.O. 58-1-21-58).

Kenya

The Kenya (Constitution) (Amendment) Order in Council, 1959, makes certain amendments to the Kenya (Constitution) Order in Council, 1958, with respect to the Council of State and one minor amendment to that Order with respect to the introduction of Bills in the Legislative Council (S.I. 1959 No. 1302).

Leeward and Windward Islands

Constitution. Constitutional changes for seven territories in the Leeward and Windward Islands were agreed upon by the Leeward and Windward Islands Constitutional Conference, which opened at Lancaster House, London, on June 15 and concluded its meetings on June 26. The United Kingdom Secretary of State for the Colonies, Mr. Lennox-Boyd, presided at the closing ceremony, when the conference's report was signed. A brief summary of the main conclusions reached at the conference is given below.

The seven territories represented at the conference, and affected by the changes agreed on, were Antigua, Montserrat and St. Kitts-Nevis-Anguilla, in the Leewards, and Dominica, Grenada, St. Lucia and St. Vincent in the Windwards. Each of these territories has its own Government and is separately a member of The West Indies Federation. For many years the Leewards have been grouped for administrative purposes under one Governor, and the Windwards under another Governor. The Governors have been represented in each of the seven islands by an Administrator.

The Federation of The West Indies looks to achieving sovereign membership of the Commonwealth, and its unit territories are all moving towards internal self-government. The pace of advance in the various units has, for historical reasons, varied, and until now the territories in the Leewards and Windwards have enjoyed a less advanced form of constitution than the larger units (Barbados, Jamaica and Trinidad). Before the Federation as a whole becomes a sovereign member of the Commonwealth, it is considered desirable that the constitutions of each of the component units should be brought generally on to the same basis. This requires an extension of the powers of the Legislative and Executive Councils of each territory, and a reduction in the powers of the Administrators. In the new circumstances, and with the growth of a Federal Government able to provide common services, the administrative functions of the Leeward and Windward Governorships are no longer required. The Governors' powers, subject to the changes agreed on in the conference, will be transferred to the Administrators, who will in future be appointed direct by the Crown, on the advice of United Kingdom Ministers.

In each Legislative Council the elected members will be increased by two, except in Dominica and St. Vincent, where they will be increased by three and one respectively, and the number of nominated members will be reduced from three to two (from two to one in Montserrat). The only official member will be the Law Officer (except in Montserrat, where the Financial Secretary will also be a member). The councils will be presided over by an elected Speaker instead of the Administrator (except in Montserrat, whose Government wishes the existing arrangements to continue for the present).

Each Executive Council will have the general control and direction of the Government of the territory, and will be collectively responsible for it to the Legislative Council. The Leader of the Government will be styled the Chief Minister, and the Executive Council will be composed of five unofficial members (including the Chief Minister and three other ministers) and one official member (the Law Officer), except that in Montserrat the Executive Council will be composed of four unofficial members (including the Chief Minister and two other ministers) together with two official members (the Law Officer and the Financial Secretary). The Administrator will appoint as Chief Minister the member of the Legislative Council most likely to command a majority in the Legislative Council (special provision is made for cases where this is not clear from the outcome of the elections), and will appoint the other ministers and the additional unofficial member on the advice of the Chief Minister.

Ministers will be responsible for government business except criminal proceedings, internal security, the audit of public accounts and the public service. The Administrator will continue normally to preside.

The conference agreed that if a resolution should be passed by a majority of all the elected members of the Legislative Council declaring a lack of confidence in the Government, the Chief Minister should thereupon be required to vacate his office, and that, whenever a new Chief Minister was appointed, all the unofficial members of the Executive Council should vacate their offices. The conference recorded the importance which it attached to ensuring that the personal position and outside interests of ministers, particularly in the case of Ministers of Finance and Labour, did not conflict with their ministerial duties.

The conference agreed that the territories of the Leeward and Windward Islands should stand in direct relationship with the Federal Government in the same way as the other units of the Federation, and therefore that the two central groups of staff and the two posts of Governors would then no longer be necessary. Subject to consideration by the United Kingdom Government, in the light of the proposed federal conference to be held in the autumn of 1959, these will therefore be abolished. The powers of the Governors will then, subject to the various changes agreed in the conference, be transferred to the Administrators of each territory, and the central services met as far as is necessary in other ways.

At present, responsibility in respect of public officers is vested in the Governors of the Leeward and Windward Islands respectively. The Administrators will in future exercise responsibility in this respect, after consultation with the existing advisory public service commissions. The conference made recommendations to enable West Indians serving anywhere within the Federation to be considered for senior appointments in the public services of any of the Unit Governments.

At present full responsibility for the appointment of judges, magistrates and legal officers is vested in the Governors of the Leeward and Windward Islands in discretion, and judges hold office during pleasure. Judges (other than the Chief Justice) will in future be appointed to the existing joint supreme court serving all seven territories, on the advice of a single judicial and legal service commission. The Chief Justice will be appointed by the Governor-General of The West Indies after consultation with the Federal Chief Justice. The Chief Justice and other judges will be removable from office only if the Judicial Committee of the Privy Council advises removal for inability or misbehaviour.

At present, responsibility for the police is vested in the Governors in their discretion. The conference agreed that there should be a single advisory police service commission for the seven territories. Responsibility in respect of gazetted ranks for each police force (other than the heads of each force) will be vested in the Administrators, after consulting the commission. The conference also recorded the importance which it attached to interchangeability of gazetted and non-gazetted ranks between the different police forces. The existing police force which serves the Leeward Islands will be replaced by two separate forces, one for St. Kitts-Nevis-Anguilla and the other for Antigua and Montserrat.

These constitutional changes will be introduced by January 1, 1960, except that the changes in respect of the Legislative Councils will be introduced before the next general elections in each territory and that, pending these elections, the Executive Council will continue, as at present, to include one nominated member. Before new general elections can be held, a redistribution of constituencies will be necessary, and this will be undertaken in each territory by a bipartisan commission appointed by the respective Legislative Council presided over by an independent chairman. The recommendations of these commissions are to be enacted in each territory by June 1, 1960, and general elections will be held within a reasonable time after the enactment of such legislation (Cmnd. 804; Commonwealth Survey, C.O.I. July 7, 1959).

Rhodesia and Nyasaland—Federal Constitution

Commission. On July 21, 1959, the Prime Minister made a statement in the House of Commons regarding the arrangements to be made to prepare the ground for the review of the Federal Constitution of Rhodesia and Nyasaland that is to take place in 1960. The matter was also referred to in the debate on Central Africa which took place in the House of Commons on July 22 (see below). The Prime Minister referred to the talks he had had with the Leader of the Opposition and with Sir Roy Welensky, the Federal Prime Minister, and stressed the importance of the 1960 review in determining the future of Central Africa. The Government were convinced that careful preparation for this conference was essential, and proposed that an advisory commission should be appointed for this purpose, with the following terms of reference:

"In the light of the information provided by the committee of officials and of any additional information the commission may require, to advise the five Governments, in preparation for the 1960 review, on the constitutional programme and framework best suited to the achievement of the objects contained in the constitution of 1953, including the preamble." The membership of the commission would be as follows:

The chairman—from the United Kingdom (it was later stated that Lord Monckton had been appointed).

Six privy councillors—members of the United Kingdom Parliament, including three from opposition parties.

Six independent members, of whom four would be chosen from the United Kingdom and two, it was hoped, from other Commonwealth countries having experience of the working of a federal constitution.

Four from the Federation as a whole, to be proposed by the Federal Government.

Three from Southern Rhodesia, to be proposed by the Southern Rhodesia Government.

Three each from Northern Rhodesia and Nyasaland.

Of the thirteen members drawn from Central Africa, five would be Africans, none would be members of their respective Governments or legislatures. Appointments would be made by the United Kingdom Government, on the advice of the Governors or Governments. There would be one African member each from the Federation, Northern Rhodesia and Southern Rhodesia and two from Nyasaland.

The four independent members from the United Kingdom might be economists, or professors of constitutional law, or sociologists.

The commission would be expected to hold its first meeting in London in the autumn to plan its programme of work. By that time material would also be becoming available to it from the committee of officials of the five Governments, which will be carrying out a factual survey and analysis in advance of the 1960 conference.

In explaining the functions of the commission, Mr. Macmillan said:

"We think that a comprehensive commission of this kind will enable Governments to approach the conference with the best possible advice at their disposal: promote greater public understanding of the issues involved; and do something to create a common approach to these very difficult problems among all concerned. Our paramount object, in considering this matter, has been to try to create, both here and in Africa, a common mind on the next stages of the political evolution of the Federation. This seems to us the imaginative and creative course.

We have thought it right that Europeans and Africans who live in Rhodesia and Nyasaland should have a part in the consideration of matters so vital to their future. For this is not an academic exercise. It concerns the lives and homes of all the population of Rhodesia and Nyasaland, of

whatever race. At the same time, we are anxious to have a broad cross-section of opinion and knowledge from this country, and entirely independent advice from elsewhere in the Commonwealth."

Mr. Macmillan explained that the Government would be willing to consult with the Opposition on such matters as the choice of the chairman, and would also be willing to modify the requirement that the six members of the United Kingdom Parliament should be privy councillors or to adjust their proportions of Commonwealth and non-Parliamentary United Kingdom members, if this would secure Opposition support for the proposal as a whole.

The Leader of the Opposition, Mr. Gaitskell, said that, although the Opposition agreed that the conference to review the constitution of the Federation was certainly one of the very greatest importance, and that there was much to be said for preparatory work being done before the conference met, they had very serious objections to the particular form of commission proposed by the Government. In the first place they doubted whether a commission with half its membership nominated by the four central African Governments would have the confidence of Africans. Secondly, there seemed to be a danger that the commission would, with its terms of reference, anticipate the 1960 conference; this was undesirable, because it was important that, at that conference, African opinion should be properly represented through the Governments of the territories concerned. Thirdly, the Opposition did not feel that six members out of a total of twenty-six adequately reflected the great responsibilities of the United Kingdom Parliament in the matter.

These criticisms had been made when the Prime Minister, in their private talks, had first put forward a proposal on much the same lines, and when the Opposition had put forward the counter-proposal of a predominantly parliamentary commission. The inclusion of African and Commonwealth members showed that Opposition views had been taken into account to a limited extent, although the number of African members was too small and it was not clear whether India would be asked to nominate one of the Commonwealth members (609 H.C. Deb. 1072-1084; see also 218 H.L. Deb. 309-315, 585-631).

Debate. In a debate in the House of Commons on July 22, 1959, on Central African affairs, the Prime Minister and the Secretary of State for the Colonies emphasised the advances that had been made since the inception of Federation in 1953. In the economic field great progress had been made. The national income of the three component territories had risen from £150 million in 1950 to £325 million in 1957. In all three territories the effect of federation had been to broaden and steady the economies, and to make possible capital investments from outside for Kariba and other projects which would otherwise not have taken place. The advantages of a unified economic structure had been shown at the time of the fall in the price of Northern Rhodesian copper, when the joint economy was steadied by the effect of Southern Rhodesian industrialisation and cash crops. Nyasaland gained about £4 million a year from the economic link through federation, and expenditure on health and education in the Protectorate had trebled. In the Federation as a whole African earnings since federation had increased by 66 per cent., and there was some £50 million of African money in the banks of the Federation. Socially there had been striking changes in the position of Africans in Southern Rhodesia; the pass laws had been relaxed in that territory and suspended in various Northern Rhodesian municipalities. There were multi-racial trade unions, apprenticeship and workmen's compensation Bills, and the opening of all branches of the federal and territorial civil services to Africans. There had been African advancement on the Copperbelt and it was hoped this would soon be followed on the railways. In Nyasaland European-owned land had been halved since federation.

The Federation had also succeeded in developing, if on a limited scale, a

multi-racial political life. There was an African minister. There were twelve African members in the Federal House out of fifty-nine, and what was important, they did not sit as an African group but belonged to different, multi-racial, political parties. In Northern Rhodesia there were nine African members of the Legislative Council out of a total of twenty-four, again sitting as members of political parties. The basis of the common roll franchise arrangement was that, as the numbers of European and African voters became more nearly equal, the parties would have to court electors of both races and would have to adopt non-racial policies. There were two African ministers in the Executive Council.

Mr. Macmillan said that, notwithstanding this record of achievement, it would be foolish to deny that there was great opposition, great doubt and uncertainty about the Federation in many quarters. This had been confirmed by the tragic events in Nyasaland, and there was at present a current of opinion, particularly evident in the African Congress, against federation as such. This made the task of the constitutional review the more important. Its purpose was to review the Constitution in the light of the experience gained, to agree on any changes that might be desirable, and to consider the ultimate problem of the position of the Federation in the Commonwealth. At the same time, the Government of the United Kingdom had always made it clear that, if there were proposals which involved the two Northern Territories ceasing to be under the direct protection of the United Kingdom Government, it would be necessary to ascertain whether the peoples of Northern Rhodesia and Nyasaland desired the change, in accordance with the pledges in the preamble to the 1953 Federal Constitution. Mr. Macmillan emphasised that, whatever the method adopted for consultation, the two legislatures of the Northern Territories (qualified though they were to do their ordinary work) would not in the present state of development—or in any immediate stage of development—be more than one element in the machinery that might be devised for obtaining the views of the inhabitants.

The review had to come within nine years from the establishment of the Federation, and Mr. Macmillan said that he had considered whether it should be postponed until 1962 as had been suggested. He had decided against this course, on the ground that this would mean three years of inaction and uncertainty which would damage confidence and encourage those who wished to break up the Federation. It would not be possible for sufficient constitutional advance to take place in the Northern Territories in that time materially to alter the situation.

However, Mr. Macmillan was in agreement that constitutional advance should take place as rapidly as possible in the territories for which the United Kingdom was responsible. He said: "We have to think of increasing the constitutional responsibilities of the Territorial Governments, as distinct from the Federal Government, so that the position of each component Government can gradually approximate to that of the Federation itself, and as this determination becomes known it will do a great deal to remove the fears, suspicions, and uncertainties in Africa. . . . In other words we want to make it abundantly clear that the purpose of our policy is, as soon as possible and as rapidly as possible, to move towards self-government in Northern Rhodesia and Nyasaland. This was publicly accepted by Sir Roy Welensky and welcomed by him. . . . We therefore hope to see a broadening of the electorate, and the functions of self-government exercised on normal party political lines."

The Prime Minister then referred to the question of amendments, changes or alterations in the Federal powers *vis-à-vis* the territorial Governments. It might be that in some spheres they would be reduced and in others increased, and the advisory commission would direct its preliminary work to these and other aspects. With regard to the position of the whole Federation in the Commonwealth as an independent unit, the Prime Minister

said: "I fear that the word 'independent' has acquired many shades of meaning. The British Government will certainly not withdraw its protection from Nyasaland and Northern Rhodesia in the short run, and in the long run our object is to advance these territories to fully responsible government. Then they will be able to dispense with our protection and stand entirely on their own feet as components of the Federation. When all the units are in a position to agree, and are agreed that British Government protection is no longer needed—then, and only then—can the whole Federation go forward to full independence and full Commonwealth membership. Meanwhile, for practical purposes, there can be independence in the federal sphere, as such, and in respect of the federal functions transferred to the Federal Government."

Mr. Lennox-Boyd said that he and his colleagues had for a long time been giving a great deal of thought to proposals for changes in the Nyasaland Constitution which they were anxious should be acceptable to all concerned. The Minister of State had been about to leave for Nyasaland in February for talks, but these had to be cancelled owing to the Emergency. Despite the continuing state of emergency the United Kingdom Government was anxious that Africans should be more closely associated with the Government of the Protectorate and it had accordingly decided to increase by nomination the number of African seats on the Legislative Council; in order to maintain the official majority, there would be an equivalent increase in the number of official members. It was also proposed to appoint to the Executive Council two African members taken from the Legislative Council. There would be interim arrangements which would, Mr. Lennox-Boyd hoped, be later replaced by the non-racial constitutional approach which had been adopted in Northern Rhodesia. It would be necessary to extend the life of the present Legislative Council beyond May 1960, when it would normally come to an end.

Mr. Lennox-Boyd enumerated the principles of those who are confirmed believers in federation: "First, to build up the economic strength of the Federation, without which political or social advance is impossible. Secondly, to create a new kind of race relationship which would be something quite different from either 'apartheid' or the conception of a dominant racial group. The name that we all agreed to give to this new kind of relationship was partnership, which implies a gradual breaking away from all forms of discrimination based on race, and the creation of conditions in which ability and character, not colour, should decide what a man could be or could do. Our third principle was to lay the foundations for the creation of a strong, new member of the British Commonwealth, dedicated to the preservation of these principles, but, in so far as this might involve a change in the Protectorate status of the Northern Territories, we have throughout made it clear that we stand firmly behind the pledges in the preamble."

Mr. Gaitskell said that the Opposition were not opposed to federation as such and they still recognised its potentialities in Central Africa. But it would never succeed except on the basis of consent by the African peoples. Instead, the Government in the Federation and the three territories rested today even more upon force and less upon consent than in 1953; and African opinion was even more strongly opposed to federation than ever. There were a number of reasons for this. One was the fact that federation had been imposed against African opinion, another was the absence of political progress in the Federation and the Northern Territories, and a third was the rapidity of advance in other parts of Africa during recent years. Economic development was necessary but African confidence could only be won by rapid political advance in the Northern Territories. By this he meant early changes in the franchise, a majority of elected Africans in the Nyasaland Legislative Council and the appointment in Nyasaland of African ministers equal at least in number to those of other races. In Northern Rhodesia there should be parity of representation at least between

Africans and other races on both the Legislative and Executive Councils. Since the review conference was between governments and since it was essential that Africans should be properly represented there, it was necessary for political advancement to come before the holding of the conference, and if necessary this should be postponed. Political advancement was at present obstructed by the detention of the politically active and best educated Africans; African spokesmen, both at the review conference and on the preparatory commission, must be the acknowledged leaders of African opinion and not those who would be considered by African opinion as being "stooges."

To increase the chances of African consent being won, the United Kingdom Government should reaffirm their adherence to the words of the preamble in the Constitution. Secondly, there must not be any change in the powers of either the Federal Government or of the territorial governments as against the United Kingdom Parliament unless and until there are democratic constitutions and franchises established in these territories. Thirdly, it should be made plain that any idea of Dominion status as a result of the 1960 conference must be excluded (609 H.C. Deb. 1283-1412, July 22, 1959).

Rhodesia and Nyasaland—Nyasaland

Devlin Commission. The report of the commission of inquiry into the disturbances in Nyasaland was published on July 23 with a White Paper containing a dispatch from the Governor commenting on the report (Cmnd. 814, 815). The terms of reference of the commission (whose chairman was Mr. Justice Devlin) were "to inquire into the disturbances in Nyasaland and the events leading up to them."

The commission was not sitting as a court of law and held hearings in private, and there was no confrontation of witnesses or right of cross-examination of witnesses. Its report (143 pages) is, as it says, not written in the form of findings for or against any individual, but as a statement of facts "based on what we believe to be the balance of probabilities and not upon proof beyond reasonable doubt."

The report is divided into six parts. Part I reviews events from 1944 to July 1958. In this part it says that "the Government was a benevolent despotism"; but adds "the despotism" was that of a kindly father and not of a tyrant. Part II covers July 1958 to January 1959, including the return of Dr. Banda from the Accra conference and subsequent incidents. Part III deals with the events of January and February 1959, including the emergency meeting of Nyasaland African Congress leaders in the bush on January 25 and the disturbances which took place in various parts of the Protectorate during February. Part IV discusses the question whether, at the meeting on January 25, the Congress leaders had made a detailed plan of assassination. Parts V and VI deal with the operations by the security forces on and after March 3, following the declaration of a state of emergency.

The commission concludes the Government had either to act or abdicate; and since with the forces at its disposal the maintenance of order could not be achieved within the ordinary framework of the law, it had to resort to emergency powers. The more extreme leaders had by the beginning of 1959 "made up their minds that they would get Congress to adopt a policy of violence." The commission dismisses the suggestion that the Governor had acted under pressure from the Federal Government.

The commission concludes that a policy of violence was adopted, and beating and killing certainly discussed, at the meeting on January 25, but did not find any detailed plan for massacre and assassination. The commission formed the view that Dr. Banda "would never have approved a policy of murder, and that he would have intervened decisively if he had thought that it was so much as being discussed." However, he had come to regard some degree of violence as inevitable, and he never condemned it categorically. It was Dr. Banda's inaction which made the meeting on January 25 possible.

The commission reports that the Nyasaland Government regarded the "murder plot" (*i.e.*, a detailed plan for assassination) as "a possibility rather than a probability, but something which had to be treated seriously"; and that even "if the Government had had no information about a murder plot, they would still have declared a state of emergency on or about March 3." It says that the effect of the publicity for the alleged murder plot has been unfortunate, that Africans are incredulous, and that "the attempt to involve Dr. Banda in massacre and assassination is generally thought by those who have seen or heard him to be ridiculous." The commission adds that "the publicity given to the murder plot has distracted attention from the real strength of the Government's case against Congress."

Parts V and VI deal in detail with the disturbances which it construes as chiefly occasions involving the use of firearms and the measures taken to restore law and order and break the Congress organisation after it had been declared illegal. It is critical of methods used to disperse meetings and render Congress ineffective and of the extent of the force and measures of restraint used in certain cases. In particular it was satisfied that illegal use of force in villages where Congress was strong was "expressly or impliedly authorised from the top." But the commission found that in the incidents recorded in Part V no one had been "trigger-happy" and was satisfied that "each man did what he did because he honestly felt that he could not discharge his duty in any other way."

Governor's Dispatch. The Governor records his satisfaction that the two most important conclusions of the commission "fully vindicate my Government's action," *i.e.*, that "in the situation which existed on March 3, the Government had either to act or to abdicate"; and that that situation was the result of the adoption of a policy of violence, to which the Nyasaland African Congress leadership generally was a party. As the protecting power, responsibility rests with the United Kingdom. The commission itself stressed the relatively primitive form of African society and the political immaturity of Africans in Nyasaland. Against such a background the United Kingdom Government believe that "the consequences of an immediate abandonment of our trust would be chaos and disaster for those in the territory." The commission's use of the phrase "police State" in connection with the emergency "will be quoted out of context and misused throughout the world." Such a phrase is not true of Nyasaland. Leading Africans even now freely express vigorous opposition to Government policy, for example, on federation, but they condemn violence, whereas violence was the adopted policy of Congress.

The Governor denies that private hearings by the commission were necessary for the sake of witnesses because they were afraid of the Government. The commission gave assurances of immunity to them on his behalf. The commission found that Congress was using intimidation and cites the decision of the Congress conference of January 25 to keep a black list of "stooges and quislings," suggestions for dealing with whom ranged from deportation, when self-government arrived, to killing.

The Governor rebuts detailed criticisms made of certain passages in his dispatch of March 18 (Cmnd. 707) by reference to other passages in the commission's own report.

He deals in detail with the commission's statement that it did not find "any detailed plan for massacre and assassination." It found that there was talk at the conference of January 25 of beating and killing Europeans. The Governor draws no distinction between talk of beating and killing on the one hand and talk of massacre or assassination on the other. "Massacre may be a matter of numbers but murder is murder whether you call it killing or assassination." The Government's subsequent actions were dictated by the real threat to life resulting from the Congress policy of violence. The Governor quotes a document which was accepted by the commission as

giving "as good an impression as can be got of what went on" at the conference. In this these words appear: "If our Doctor [Dr. Banda] were caught what would be [sic] do:

- (a) Word will issue from the central body telling all;
- (b) People to start war after two days;
- (c) Digging up roads, destroying anything belonging to Europeans;
- (d) Not to pay taxes;
- (e) To hit Europeans or cut throat."

The Governor gives facts and figures derived from the commission's report to show that many of the decisions recorded in this document were subsequently implemented locally by Congress, sabotage being launched even before Dr. Banda was detained. In view of the importance attached to this document and subsequent events he cannot treat the statement beside (e) as "anything less than a record of a decision to resort to personal violence and murder, and as anything else than an essential part of a general scheme." Special Branch reports of the meeting came from seven independent sources from different parts of Nyasaland, each ignorant of the other's existence. The Governor's assessment was based on these reports, which mentioned bloodshed and murder.

On Dr. Banda's complicity in the decisions of the Congress conference, the Governor quotes Dr. Banda's statement after the date of the conference to the effect that "moderate leaders were no use," and his failure to speak publicly against violence. He notes that the commission seems to have given great weight to reports of Dr. Banda's character and to its own impression of him as a witness. He cannot acquit Dr. Banda of responsibility for the policies of violence adopted at the meeting.

The Governor has had no time to deal with the detailed incidents in the commission's account of events after March 3. On its general observations, Congress policy, involving violence and killing if Dr. Banda were arrested, made it necessary to act with speed, secrecy and maximum available strength once his detention had been decided on. In the original operations up to March 5, 263 arrests were made, of which in seven cases evidence was that the force used had inflicted injuries. Crowds had to be dispersed because of the background of experience that they had, on the occasions quoted by the commission, resorted to violence. Forces had to be guided by special circumstances and could not afford to take chances. Sixty crowds on and after March 3, 1959, were dispersed without resort to firearms: the commission itself found in the incidents it recorded no one who was "trigger-happy."

The commission also alleges that illegal force was used in villages where Congress was strong and this was authorised expressly or impliedly from the top. The Governor repudiates any allegations that he did so. Illegal force has never been condoned. The commission's observations seem to rest on the phrase in the instructions to the security forces referring to "tough punitive action in areas where lawlessness and acts of violence are perpetrated and planned." This should be read with another sentence in the same instructions, that these areas "will be dealt with firmly but without brutality." The Governor concludes that a serious threat was averted by prompt action, and pays tribute to all ranks and all races who took part. (This summary is based on Commonwealth Survey C.O.I., August 4, 1959.)

Debate. On July 28, 1959, the United Kingdom House of Commons adopted, after debate, the following motion:

"That this House takes note of the report of the Nyasaland Commission of Inquiry and the Dispatch from the Governor of Nyasaland thereon, and extends its thanks to the chairman and members of the commission for their work; endorses their conclusion that a policy of violence was adopted by the Nyasaland African Congress leadership and that the

declaration of the state of emergency was fully justified; deeply regrets the loss of life that occurred, but acknowledges that prompt and effective action by the Governor prevented the development of a more serious situation; expresses its gratitude to the Administration and to the security forces for their loyal service in circumstances of great difficulty and looks forward to the restoration of normal conditions in Nyasaland and to the continued constitutional and economic progress of its people on the basis of respect for law and order."

Government views. In putting forward this motion Sir Reginald Manningham-Buller, the Attorney-General, said that the commission had found that, in the situation that existed on March 3, the Government had either to act or to abdicate, and that it had to resort to emergency powers. In arriving at this conclusion it was satisfied that, by the beginning of 1959, the extremists had made up their minds to adopt a policy of violence and it described the effect of the meeting of January 25 as being an all-out campaign to defy the Government, violence not excluded. The decision was soon followed by a series of violent incidents throughout the country. In addition there was the information from seven separate and independent sources that bloodshed had been discussed at the emergency conference. The Attorney-General said that, in the circumstances, the Governor would have failed in his duty if he had not acted as he did.

Moreover, the language used by Mr. Lennox-Boyd and Mr. Amery, at the time the state of emergency was declared, was not exaggerated and was fully justified by the information in the Government's possession, which appeared to indicate a general and widespread belief that Congress had adopted a policy of violence that included killing. It was true that the commission did not think that there was anything that could be called a plot, but it found as a fact that there was a great deal of talk about beating and killing at the January conference and said that with all that talk it was certainly conceivable that some Africans were thinking about murder. The Government could not come to the conclusion that what had happened at the emergency conference had not constituted a very real threat to the lives of Europeans and those Africans who had incurred the enmity of Congress. But whether the Government were right about this was of little consequence, because the commission recognised that, even if there was no policy of murder, conditions were such that the Government had to resort to emergency measures.

The Attorney-General said that the choice by the commission of the expression "police State" to describe Nyasaland after the proclamation of the emergency was singularly unfortunate; during an emergency many of the freedoms normally enjoyed had to be curtailed. It was also unfortunate that the commission had put forward the wrong reason for the decision that it should hear witnesses in private.

Two views could be taken of Dr. Banda. One that he was more or less a figurehead and that his three principal assistants ran Congress and were responsible for the adoption of the policy of violence; and the other that, though he chose to dissociate himself from any public association with the policy and acts of violence, in fact he connived at, and was a party to, that policy. The commission appeared to take the former view. It was, however, very difficult to believe that he was ignorant, and remained ignorant, of the secret items discussed at the conference, items which were discussed at a meeting of the Executive Committee in his own house and which after the conference were reported on at branch meetings all over the country. Dr. Banda did nothing to control the crowd at the Zomba incident at which he was present on January 20, and the commission found that at no time did he condemn violence categorically. The strong presumption was that Dr. Banda was a party to the policy of violence, and the commission's

decision with regard to him was against the weight of evidence which the commission itself found.

The Government deeply regretted that, following the adoption by Congress of its policy of violence, fifty-one people died and seventy-nine were wounded. But had it not been for the prompt action taken the number of casualties would necessarily have been much greater, and the Government were thankful that the prompt action taken and the loyal service of the security forces did avoid all risk of a major catastrophe. Now that the policy of violence had been frustrated it was to be hoped that conditions in Nyasaland would soon so far improve that it would be possible to release those now detained without risk to law and order and security. Law and order had to be maintained and on the maintenance of law and order depended the prospect of continued constitutional and economic progress for the people of Nyasaland.

In his speech, the Secretary of State for the Colonies recognised that one of the main causes of the difficulties in Nyasaland in the last few months had been fears about the concept of federation. The Governor had never left the Secretary of State in any doubt as to the strength of the opposition in Nyasaland, and although both the United Kingdom Government and the Nyasaland Government regarded it as ill-founded they were both aware of its widespread nature. It was the profound hope of the Prime Minister and himself that the assurances regarding the status of Northern Rhodesia and Nyasaland which they had made during the debate on July 22 would do something to dispel these fears in Nyasaland.

The report made it clear that, in the view of the commission, the decision to declare a state of emergency, to postpone Lord Perth's visit and to ask the Federal Prime Minister, the Governors of Northern Rhodesia and Tanganyika and the Government of Southern Rhodesia for military and police reinforcements, was the decision of the Governor of Nyasaland alone.

It had been said that it was wrong for the Government to have tabled a motion that did not accept all the opinions and conclusions at which the commission arrived. The commission regarded its task as a fact-finding one to be used as a basis for administrative and political decision. But it also drew inferences from the facts and such inferences could not be regarded as sacrosanct. There was nothing whatever improper in commending to the House the broad endorsement of the Nyasaland Government's policy which the report contained and not commending inferences or opinions with which, after careful consideration, the Government did not agree.

In this connection the appointment of the commission itself was wholly inconsistent with the suggestion that Nyasaland was a police State. The commission had complete freedom to speak with whomever the members wished; neither the Secretary of State nor the Governor knew whom—for example, which members of Congress—they had interviewed. And Nyasaland people were today exercising their right to oppose the Government by constitutional means—for example, over federation.

Mr. Lennox-Boyd commented on the commission's criticisms of the operations of the security forces. The commission, while agreeing that the use of unnecessary and illegal force was never expressly authorised, said that individual officers were given too much latitude and their illegalities often went unnoticed or unchecked. The commission considered in its report only six cases in which force was used in effecting arrests. This must be set against 263 arrests made in the original operation up to March 5 and a further 900 made later. The commission had shown that gagging occurred in one area, and the Secretary of State and the Nyasaland Government deeply regretted what had occurred. They also regretted the unauthorised burning of houses that had occurred in one area and to which the commission had drawn attention.

In reply to the criticism that the delay in bringing into operation constitutional changes had contributed to the tension that preceded the disturbances,

Mr. Lennox-Boyd said that he had made it clear that the existing 1956 Constitution would run until 1960, when the life of the existing Legislative Council was coming to an end. It was hoped that there would be agreement well before 1960 as to what the changes thereafter were to be and the intention had been to bring the discussions to a conclusion during Lord Perth's projected visit in February. In any case the commission had found that the delay in reaching agreement had not been a factor of any great weight in the deliberations of Congress, whose leaders had practically given up hope that anything satisfactory to them would come out of the constitutional talks.

Mr. Lennox-Boyd said there could be no possible suggestion of treating Dr. Banda differently from other detainees.

For the future, he visualised a steady movement towards internal self-government; constitutional change would have regard to the overwhelmingly African majority in the population but would be so devised that, as in Northern Rhodesia, those who stood for election had to pay some regard to the interests of other races. The scheme would, however, be different from the Northern Rhodesian scheme.

Opposition views. These were expressed by Mr. Callaghan, Mr. Bevan and other speakers in support of a motion accepting the whole of the commission's report. Speakers were critical of the Government's action in appointing an authoritative and judicial commission of inquiry, and then accepting only certain of its conclusions, while rejecting the "firm basis of fact which the commission had endeavoured to provide." They represented that this treatment not only distorted the commission's findings but would undermine the confidence of Africans in future reports of this kind. The Government had failed to take note of the commission's central conclusion that there was a deep and bitter gulf of opinion separating the Nyasaland Government from the people on the issue of federation; and it had not acknowledged that part of the report which made it clear that the policy of violence resulted from the mood of frustration felt by Congress because there was no constitutional way of making its views effective. This frustration had originated with the imposition of federation against African wishes, but it had grown with the years and had been strengthened by the 1957 agreement between the United Kingdom Government and the Federal Prime Minister and by the long delay in bringing about constitutional reforms in Nyasaland. The assurances which had recently been given by the United Kingdom Secretary of State for the Colonies about the future of Nyasaland had come too late; had they been made in 1957, instead of the agreement with Sir Roy Welensky, the course of events might have been very different. As it was, doubt and fear had persisted. Nyasaland Africans had not felt that at the 1960 constitutional conference they would be represented by people of their own choosing, and with the United Kingdom Government's rigid stand on federation, the prospect of collision sooner or later had become almost certain. The Government was clumsy in handling a proud and sensitive people, and it was not surprising that a position was reached in which the extremists were able to persuade Congress that violence should be adopted. For these reasons the Nyasaland Government and the Colonial Secretary could not escape condemnation for the events of March 3.

The commission did not find that the Congress leaders had more than their share of ambition; it described them as being "first and foremost African nationalists," commanding virtually unanimous support from the people of Nyasaland. Dr. Banda was an essentially peaceful and reasonable man who had described himself as being against violence. One of the most serious sections of the commission's report was the paragraph in which the commission spoke of the Government's action towards the breaking up of the African National Congress, the one indigenous political organisation.

As the commission had shown there had been no murder plot, and the United Kingdom Government had done great damage by putting it about that

there had been, in the Secretary of State's words, "a massacre plot." The commission drew a distinction between the violence that Mr. Chisiza and Mr. Chipembere sponsored and the violence with which they were credited. It was to be done in response to Government measures so that it could be represented as an answer to provocation. In other words it was to be a reaction, rather than an initiative. That there had been no murder plot had been shown by the facts that isolated and unarmed Europeans had not been attacked by Africans and that the overwhelming majority of those arrested offered no resistance.

If the Government had accepted the findings of the commission's report it would have been possible to make a fresh start. The House of Commons should be considering how best to make the superhuman effort that was necessary to bridge the deep gulf existing between the United Kingdom Government and the people of Nyasaland. Secondly, there could have been a calm re-appraisal of the policy of federation, for federation had been shown beyond argument to be the cause of this deep and bitter division. The Government should even now find out on what basis the people of Nyasaland could be reconciled to the idea of federation or, as that seemed unlikely, what alternative could be found. Thirdly, the House should have been discussing how best to make the transition from the paternalistic approach of a well-meaning Government to a situation in which a small but growing minority of Africans was as well-equipped as the average European to take prudent decisions on policy. Finally, members should have been asking themselves what was the best policy to pursue in a country in which the European population was fundamentally on the defensive and in which their safety depended on striking first.

The Opposition proposed first that the men in detention should either be released or brought to trial; secondly that a pledge should be made to the people of Nyasaland that they would have the opportunity of seceding from the federation or of taking part in some alternative form of association with the other territories; and thirdly that there should be constitutional talks at once with all concerned, including those in detention, so that Africans could assume more and more responsibility for the conduct of affairs (610 H.C. Deb. 317-454, July 28, 1959; see also 218 H.L. Deb. 757-896).

Governor's statement. On August 24, 1959, the Governor of Nyasaland, Sir Robert Armitage, announced that effect had been given to the interim constitutional changes forecast by the Secretary of State for the Colonies in the United Kingdom House of Commons on July 22. The details are as follows:

1. African representation on the Legislative Council will be increased by making provision for two additional African seats, making a total of seven seats with a corresponding increase of two official members.
2. There will be appointed to the Executive Council two African members from the Legislative Council.
3. In order to give the Legislative Council in its new form the opportunity to function satisfactorily and for a reasonable length of time, the life of the council has been extended beyond May 1960, when it would normally have come to an end. It is hoped that the period of the extension will not greatly exceed one year.
4. Any member of the Legislative Council who is the subject of a Governor's detention order will vacate his seat if the Governor so directs, and
5. The Governor will himself appoint Africans to occupy the seats of any African members which may be, or become, vacant and the members so appointed will occupy their seats during Her Majesty's pleasure.

In exercise of the powers conferred upon him, the Governor has directed that the seat of Mr. H. B. Chipembere shall become vacant. The Governor

has already declared the seat of Mr. M. W. K. Chiume to be vacant as provided for in a section of the Legislative Council Ordinance.

In conjunction with these changes certain alterations in the detailed arrangements for the carrying out of the executive functions of the Government are to be made, so that unofficial members of the Executive Council can progressively be associated in a more active and practical way in the day-to-day conduct of the affairs of the Government.

The Governor's statement pointed out that these arrangements are interim measures to tide over the difficult period that lies ahead, during which normal conditions must be restored. During this interim period a situation must be created in which there will be the opportunity to resume consideration, in a peaceful and orderly atmosphere, of the constitutional advancement of the peoples of the protectorate, including the provision of a non-racial qualitative franchise.

In conclusion, the Governor said that these interim arrangements must be viewed not in isolation but against the background of the future; he referred to the assurances given by the Prime Minister in the United Kingdom House of Commons on July 22 regarding the pledges in the preamble to the 1953 Constitution of the Federation of Rhodesia and Nyasaland and the means to be adopted in any consultation with the peoples of the northern protectorates regarding their future.

As a result of these changes, the Legislative Council will comprise a Speaker and twenty-seven members. Of these, four will be *ex officio* members, ten will be official members and thirteen will be unofficial members. Of the unofficial members, six will be non-African and seven will be African. There will thus for the first time be a majority of Africans among the unofficial members.

The Executive Council will consist of the Governor and nine members. Of these, three will be *ex officio* members, two will be official members and four will be unofficial members—two of them African. They will be the first African members of the Executive Council (Commonwealth Survey C.O.I., September 1, 1959).

The Report on Nyasaland for 1958 has been published by the Colonial Office (H.M.S.O. 58-1-32-58).

Somaliland

In reply to questions in the House of Commons on July 23, the Secretary of State for the Colonies, Mr. Lennox-Boyd, made a statement about recent constitutional developments in the Somaliland Protectorate. These include the publication in the Protectorate of the report of the Commission on Constitutional Reform, appointed by the Governor early this year, and the acceptance by the Somaliland Government of its main recommendations; and the designation of the seven ministries which are to be established when a ministerial system is inaugurated early in 1960.

Below is the text of Mr. Lennox-Boyd's statement:

"The Commission on Constitutional Reform in the Protectorate which my hon. Friend the Under-Secretary of State referred to in his statement in this House on February 9 has now reported and its report has just been published in the Protectorate. Its main recommendations are that the next Legislative Council should consist of three *ex officio* members and thirty-three Somali members elected by all adult males in their constituencies. Voters in certain urban constituencies will be registered but those in rural constituencies will not, and a special method of counting voters has been devised. On July 21 the Colonial Secretary gave notice of a motion in the Legislative Council accepting the recommendations of the commission, subject to certain minor amendments. This is being debated by the Legislative Council this week, and when the Governor reports to me on the outcome I shall make a further statement.

Meanwhile, the Somaliland Government has made the following announcement relating to the introduction of a ministerial system:

'Arrangements are now complete for the reorganisation of the machinery of Government to prepare for the introduction of a ministerial system when ministers take office early next year. There will be seven ministries, as follows:

1. Ministry of Defence and External Affairs.
2. Ministry of Finance.
3. Office of the Attorney-General.
4. Ministry of Local Government.
5. Ministry of Social Services.
6. Ministry of Communications and Works.
7. Ministry of Natural Resources.

In the interim period between now and the appointment of ministers, senior officials will be charged with the responsibility for the work of the departments grouped within each ministry. It is hoped that four elected members of the present Legislative Council will be associated with the work of the groups of departments to be included in the following ministries:

Ministry of Local Government.
 Ministry of Social Services.
 Ministry of Communications and Works.
 Ministry of Natural Resources.' "

Constitutional changes were introduced in the Protectorate early in 1959 and the territory's first elections were held in March. The Legislative Council, which was formerly composed entirely of official and nominated members, now has thirteen elected members, with a maximum of seventeen official members and three unofficial nominated members (609 H.C. Deb. 1510-1511).

Swaziland

The report for 1957 has been published by the Commonwealth Relations Office (H.M.S.O. 58-1-42-57).

See also **Basutoland** (above, p. 417).

Trinidad and Tobago

A new constitution for Trinidad and Tobago, which marks an important step in the territory's progress towards internal self-government within the Federation of The West Indies, was brought into operation on July 20. One of the main features of the constitution is the introduction of the Cabinet system of Government.

The Cabinet consists of a Premier, eight other ministers (previously seven) and two *ex officio* members (the Chief Secretary and the Attorney-General). Dr. Eric Williams, Chief Minister under the previous constitution, has been called upon to be Premier and has also assumed the portfolio of Finance. The other ministers have been allocated the following portfolios: Home Affairs; Agriculture, Lands and Fisheries; Education and Culture; Health, Water and Sanitation; Housing and Local Government; Industry, Commerce, Tourism and External Communications; Labour; and Works and Transport.

It was decided at the 1958 constitutional discussions that the question of the transfer of responsibility for the police to a minister should be the subject of further consultation. Following a recent visit to Trinidad by Mr. Amery, United Kingdom Under-Secretary of State for the Colonies, it was announced that the Colonial Office had agreed to the transfer, subject to certain safeguards approved by the Opposition party in Trinidad and Tobago. The transfer will take place as soon as the agreed Police Service Commission has

been set up and the necessary legal and administrative arrangements completed (Commonwealth Survey, C.O.I., August 4, 1959).

Uganda

The report for 1958 has been published by the Colonial Office (H.M.S.O. 58-1-47-58).

Virgin Islands

Following discussions in London between the Secretary of State for the Colonies and a delegation representing the Government of the British Virgin Islands, changes in the constitutional arrangements for the islands were announced by the Colonial Office on July 22. The British Virgin Islands are not a member territory of the Federation of The West Indies, but are part of the Leeward Islands, and are affected by some of the constitutional changes recently agreed for those islands.

The delegation reaffirmed its Government's desire to remain under the British Crown. It has stated that its Government does not wish to reconsider its decision to remain outside the Federation of The West Indies, although it hopes to maintain a close association with the Federation.

It was agreed with the delegation that at such time as the office of Governor of the Leeward Islands is abolished, the head of the Government of the Colony of the Virgin Islands shall be an Administrator appointed by the Queen and responsible direct to the Secretary of State. At the same time, the Executive Council of the colony shall be increased by the addition of a third elected member; and in the meantime the Governor and Administrator will examine by what means the responsibilities of those elected members who already play a part in the government of the colony may be extended.

The Government of the Virgin Islands has expressed the hope that it will be possible for it in the future to continue to share with the Government of the Federation of The West Indies and with the other Governments of the Leeward Islands certain advisory and other services which are at present available to them.

Under the colony's present constitution the Legislative Council consists of the Administrator as president, two other official members, two nominated unofficial members and six members elected under universal adult suffrage; the Executive Council consists of the Governor or Administrator as president, the Administrator *ex officio* (when the Governor is present), two other official members, one nominated official member of the Legislative Council and two elected members of the Legislative Council (Commonwealth Survey, C.O.I., August 18, 1959).

The West Indies

See **Leeward and Windward Islands** (above, p. 420); **Trinidad and Tobago** (above, p. 434).

BOOK REVIEWS

POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES. By THOMAS I. EMERSON and DAVID HABER. Second edition, 2 vols. [New York: Dennis & Co. Inc., Buffalo. 1958.]

THIS collection of "legal and related materials" by Professor Emerson of Yale University and Professor Haber of Rutgers University was first published in 1952. It is a case book in the American style of over 1,500 pages. The chapters are entitled The Right to Security of the Person, The Right of Franchise, Freedom of Speech, Academic Freedom, Freedom of Religion, and Discrimination.

As the authors say in their Preface to this Second edition, in the six years between 1952 and 1958 "legal developments in almost every area of political and civil rights have come thick and fast" and they mention, *inter alia*, the Smith Act prosecutions, the Communist Control Act, and the segregation decisions. A book of this size with its materials drawn from so many sources defies detailed review. But let it be said at once that it is a first class achievement. The selective comprehensiveness of the basic texts and the vast amount of additional matter in the "Notes" are wholly admirable. It contains one gem of indexing for at the top of page 1,526 appear three touching entries which read:

"Mill, John Stuart, 261-5; Miller, Arthur, 505, 725; Milton, John, 254-9." We move from On Liberty to Areopagitica by way of modern witch-hunting. And in that section (Freedom of Speech—The Tradition) we have also the Declaration of Independence, Jefferson's first Inaugural Address, Mr. Justice Holmes dissenting in *Abrams v. United States*, and Mr. Justice Brandeis concurring in *Whitney v. California*. Arthur Miller appears in the middle of a list of some of those to whom the Department of State refused to issue passports under the regulations called "Limitations on issuance of passports to persons supporting Communist movement" along with Paul Robeson, Otto Nathan, Carl N. Foreman (who wrote the film scripts for "High Noon" and "Home of the Brave"), Dr. Pauling, and others.

The chapter on discrimination is particularly instructive and teaches lessons we might do well to learn now rather than later. It is divided into four sections: housing, education, transportation and public accommodations, and employment. Some of the problems are peculiar to the United States at least in their extent but others are becoming too familiar too quickly in the United Kingdom.

A case book on such a subject is an anthology of man's greatness in speech and action and a concealed list of his unbelievable stupidities and vice. Anyone interested in government, in law, in political science, in freedom, in slavery, in height, in depth, in principalities, in powers, in things present, in things to come, or any other creature, should read this book. No mere collection, however well edited, can be a great book and there are excerpts in these 1,500 pages that look a bit silly when set down in the company of some of the others. But the book remains, for most of its contents, a very fine collection most learnedly composed.

J. A. G. GRIFFITH.

BRITISH PRESSURE GROUPS. By J. D. STEWART. [Oxford: Clarendon Press. 265 pp. 30s.]

ANONYMOUS EMPIRE. By S. E. FINER. [London: Pall Mall Press. 148 pp. 12s. 6d.]

POLITICAL science in Britain is managing, in a modest way, to follow the fashions created by the more numerous and affluent Americans in the field. We have our studies of political behaviour, and now Mr. Stewart and Professor Finer have produced the first British books on British pressure groups. We still, perhaps, have a long way to go, for admirable as these two works are, they are far from the heights which have been reached in some American studies of "groups" in the political process. Assuming, however, that there is an element of fashion in this style of endeavour, it is quite possible that it may never be necessary for us to follow the American leaders to their rarified heights of sociological abstraction; for they may descend, some day, wondering what it was that took them aloft in the first place. These style leaders went up, of course, in the belief that there is always room at the top. There is; but, the thrill of achievement apart, there is very little that one can do on, or with, a mountain peak. One can cogitate there, set up models and construct conceptual frameworks but as all the raw materials are down on the plains it will be necessary, sooner or later, to come down to the dowdy provincial world of observation and common sense.

Mr. Stewart and Professor Finer stay on the ground, and when they do face the crucial question of whether pressure groups are desirable in a modern democratic community they frame their answers in terms of the community and the values with which they are concerned, *i.e.*, those of Great Britain. In saying that this is the common sense approach it is your reviewer's intention to thereby praise it, and to hope that followers in the path of Stewart and Finer will eschew excessive quantification in favour of clear description and serious discussion in terms of the particular values of the political community being described.

What so much modern work in the "group" field seems to achieve is a vast amount of data on multiple group memberships; elaborate discussions of definitions of the "group"; descriptions of groups at work, and an epilogue which frequently merely re-affirms (despite the evidence) the writer's opening premiss that the group is the "real" unit in the socio-political process. (And one must not forget the thanks, and hopes for more, directed at the research foundations whose patient officials must know by now every possible variation of the plea that until more "facts" are in, no adequate theoretical framework can be erected.)

What has all this to do with Messrs. Stewart and Finer? Quite a lot; for as we have less money to spend—and low expectations about its availability—we have less quantification. Because we expect less we must guide our thoughts in manageable directions. Problems of representation (of individuals or groups) and of their access to political institutions are basically problems in political theory. The possibilities of quantification do not make a problem more significant. The problem is there already, in the general area of political theory, and quantification, while it may assist the thinker can rarely solve the problem. (It may, of course if it proves that the so-called problem in fact no longer exists.) Are all interests created equal? Is the "public interest" more than a political balancing of group interests? Is Whitehall itself an interest? And ought it to be? To these questions the studies under review bring essential facts not hitherto readily available elsewhere; and it is their great merit that they do not take the view that if one assembles enough facts together in a confined space, these factual impersonalities (by a process of spontaneous intellectual combustion) will start doing the assembler's thinking for him. In addition to Professor Finer's plea for

"Light, more Light" on pressure groups in Britain, it is necessary to ask for "Thought, more Thought" in those circles affluent enough to afford elaborate quantification of social and political data.

Mr. Stewart is mainly concerned with the role of pressure groups in relation to the House of Commons, but his book covers also the process of consultation of the interests by Whitehall and the "public relations" problems of which public to influence and by what means. His work is largely descriptive, but he does not shy away from the broad issues of political theory. His main conclusions are that the activities of organised "interests" are legitimate features of our political process, and that the "interests" are often helpful and thoughtful in their negotiations with Whitehall. But pressure groups are not *politically* responsible. Prestige advertising by steel companies and trawler owners is completely self-regarding. To suggest (as some writers seem to do) that the great business corporations are now so benevolent, progressive, wise and charming that there is less justification for positive government than ever before is to miss an important point. The great interests (whatever or whoever they be) do not want to govern the country. They want influence in a few important areas of policy: in short, power without responsibility. Mr. Stanley Baldwin had a devastating definition of this kind of desire. Mr. Stewart sees all this very clearly and concludes his book by reminding us that the political parties have a vital part to play in preventing government from being borne down under the weight of well organised pressure groups. In addition government itself must have a view of its public responsibility: Whitehall must do more than arbitrate between the powerful: it must initiate and command.

Professor Finer's general conclusions do not conflict with those of Mr. Stewart. Professor Finer covers slightly more ground and writes in a style which might be described as the "academic provocative"—one which is well fitted for exploration and seizure of territory to which more conventional minds may have laid claim. In addition to description Finer is concerned to show that groups may have unrepresentative leaderships which detract from the moral and political value of the claims they make on behalf of their membership. Some "groups" (well organised) commit acts of aggression against the unorganised. Consumers are always the victims of producers (or distributors) unless government steps in on the consumers' side—which it almost never does. Professor Finer dislikes economic threats (*i.e.*, strikes) which disturb the convenience and comfort of the public: but as he has nothing new to say about their causes or cure one wonders why he brings this in. If strikers can exploit their occupational position by holding up the public to ransom—and are therefore to be likened to bandits (these are not Finer's words) what are motor-car salesmen or estate agents—or indeed lawyers? And, while on this critical note, is it not a little naïve to suggest (p. 111) that in the field of T.V. and Radio the interest groups are without power because these media have been neutralised politically by statute? As Professor Finer is known to be anything but naïve, it is hoped that he would agree that far more goes into the making of political opinion than the few party broadcasts carefully allocated among the established political parties—and even then only among *some* of those parties. B.B.C. and commercial T.V. may in fact be ineffective in opinion formation; that is another question. But an important aim of commercial T.V. is to arouse desires for certain goods and values about the merits of which very considerable political dispute is possible. Professor Finer has written a most attractive and stimulating book which is in no way marred by the lapses from objectivity which have provoked this reviewer.

R. H. PEAR.

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